No. 481

In the Supreme Court of the United States

OCTOBER TERM, 1957

ROCKWELL KENT AND WALTER BRIEHL, PETITIONERS

v.

JOHN FOSTER DULLES, SECRETARY OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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v.

JOHN FOSTER DULLES, SECRETARY OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The unreported oral opinion of the United States District Court for the District of Columbia in the *Kent* case appears at pp. 84 and 169–170 of the Record. The unreported order of the District Court in the *Briehl* case (R. 170) was entered without opinion, other than an oral reference to the ruling in the *Kent* case (R. 168–169). The opinions of the Court of Appeals for the District of Columbia Circuit, sitting *en banc*, in the *Kent* case (R. 87–90) and in the *Briehl* case (R. 241–246), are reported at 248 F. 2d 600 and 248 F. 2d 561, respectively.

JURISDICTION

The judgments of the Court of Appeals (R. 91–94, 247–250) were entered on June 27, 1957. The peti-

tion for a writ of certiorari was filed on September 18, 1957, and was granted on November 25, 1957 (R. 253). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The Department of State has declined to continue processing petitioners' passport applications because each petitioner has refused to file, as a part of his application, a statement with respect to present or past membership in the Communist Party, as required by the regulations. An act of Congress now in force (8 U. S. C. 1185) makes it unlawful for a citizen to depart from the United States in time of war or proclaimed national emergency without a valid passport. The following questions are presented:

1. Whether 8 U. S. C. 1185 authorizes the Secretary of State to restrict foreign travel of citizens during the present proclaimed emergency by refusing, in the exercise of his discretion, to issue passports on grounds to which present and near-past Communist membership are relevant.

2. Whether the Constitution (a) forbids the denial of passports and the resulting restriction of foreign travel, on grounds to which present and near-past Communist Party membership are relevant, in the manner contemplated by Congress and as implemented by the Secretary of State, or (b) prohibits inquiry into present and near-past Communist Party membership as a part of a passport application.

STATUTES, PROCLAMATIONS, EXECUTIVE ORDERS, AND REGULATIONS INVOLVED

The pertinent portions of Titles 8, 22, and 50 of the United States Code; of Presidential Proclamations No. 2914 of December 16, 1950, and No. 3004 of January 17, 1953; of Executive Order No. 7856 of March 31, 1938; and of the regulations of the Secretary of State relating to passports are printed in Appendix A, *infra*, pp. 102–116.

STATEMENT

In these actions, petitioners Kent and Briehl seek judgments declaring that they are entitled to passports, that the passport regulations of the Secretary of State are in violation of the applicable statutes and the Constitution, and that the Secretary's refusals to issue a passport to Kent and to renew Briehl's expired passport constitute violations of petitioners' statutory and constitutional rights. Petitioners further seek orders enjoining the Secretary from continuing to deny passports to petitioners and directing that he issue a passport to Kent and renew Briehl's passport (R. 4, 103). The courts below have rejected these claims.

1. THE STATUTES AND REGULATIONS

The administrative actions which petitioners attack were taken pursuant to the statutes relating to passports and to travel, and the passport regulations issued by the respondent. These statutes and regulations provide as follows:

Section 215 of the Immigration and Nationality Act of 1952, c. 477, 66 Stat. 163, 190, 8 U. S. C. 1185

(App., *infra*, pp. 102–103), authorizes the President, in time of war or national emergency proclaimed by him, to invoke statutory restrictions making it unlawful, "except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, * * * for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport". The present state of emergency was proclaimed on December 16, 1950, by Presidential Proclamation No. 2914,[1] and the statutory travel restrictions were invoked on January 17, 1953, by Presidential Proclamation No. 3004.[2]

Title 22 of the United States Code provides that "[t]he Secretary of State may grant and issue passports * * *"[3] to persons, whether citizens or not, who owe allegiance to the United States.[4] Under the statute no applicant may be issued a passport until he has signed and submitted "a written application duly verified by his oath * * * contain[ing] a true recital of

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[1] 64 Stat. A454, App., *infra*, pp. 104–105.

[2] 67 Stat. C31, App., *infra*, pp. 105–108.

[3] 22 U. S. C. 211a, 44 Stat. 887; App., *infra*, p. 109.

[4] 22 U. S. C. 212, 32 Stat. 386; App., *infra*, p. 109. For convenience, we refer throughout this brief to persons eligible to apply for United States passports as "citizens". The original statutory limitation precluding the issuance of passports to persons other than "citizens" (11 Stat. 60) was changed in 1902 to provide, as today, that "No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States" (c. 1088, 32 Stat. 386). The purpose was to permit the issuance of passports to the new class of non-citizen nationals created by the recent acquisition of insular possessions. 35 Cong. Rec. 5697–5699, 6588–6589.

each and every matter of fact which may be required by law or by any rules authorized by law to be stated as a prerequisite to the issuance of any such passport".[5]

Regulations promulgated by the President provide that any affidavit which may be required by regulation in support of a passport application is to "be considered as, and become, a part of the application".[6] In addition, these regulations authorize the Secretary of State "in his discretion to refuse to issue a passport * * *"[7] and to make additional regulations relating to passports.[8]

The passport regulations issued by the Secretary of State, pursuant to this authority, preclude the granting of unrestricted passports to, *inter alia,* present members of the Communist Party,[9] and provide that at any stage in the administrative consideration of a passport application, "if it is deemed necessary, the applicant may be required, as a part of his application, to subscribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist Party. If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings".[10]

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[5] 22 U. S. C. 213, 40 Stat. 227, App., *infra*, p. 109; see also 22 CFR, 51.14, App., *infra*, p. 110.

[6] Executive Order No. 7856, Section 123, 3 F. R. 799, 805, 22 CFR, 51.74, App., *infra*, p. 110.

[7] Executive Order No. 7856, Section 124, 3 F. R. 799, 805, 22 CFR, 51.75, App., *infra*, p. 110.

[8] Executive Order No. 7856, Section 126, 3 F. R. 799, 806, 22 CFR, 51.77, App., *infra*, p. 110.

[9] 22 CFR, 1956 Supp., 51.135, App., *infra*, pp. 112–113.

[10] 22 CFR, 1956 Supp., 51.142, App., *infra*, p. 115.

2. THE ADMINISTRATIVE PROCEEDINGS AND THE PROCEEDINGS IN THE DISTRICT COURT

(*a*) *Rockwell Kent.*—(*1*) Rockwell Kent, an artist, filed an application for a passport with the Department of State on June 1, 1955, stating that the purpose of his desired travel was to visit England and to attend a meeting of the World Council of Peace in Helsinki, Finland (R. 11, 76). The Director of the Passport Office informed Kent (R. 22–28) that the Department was "obliged to disapprove your request tentatively on the ground that the granting of such passport facilities is precluded under the provisions of Section 51.135" of the regulations (*i. e.*, the regulation relating to Communist Party members) (R. 22), stating that "it has been alleged that you were a Communist" (R. 23). The Director added that Kent's case was also deemed to fall within the scope of subsections (b) and (c) of Section 51.135 (App., *infra*, p. 113) since the evidence indicated that Kent had maintained "a consistent and prolonged adherence to the Communist Party line on a variety of issues and through shifts and changes of that line for an extended period of time" (R. 23; see also 22 CFR, 1956 Supp., 51.141 (b), App., *infra*, p. 115). The letter set forth at length and in specific detail Kent's numerous organizational affiliations, activities, statements, and writings upon which the Department's conclusions were based (R. 23–27). Kent was advised of his right to an informal hearing in the Passport Office under Section 51.137 of the passport regulations (App., *infra*, p. 114), but was further advised that whether or not he requested a hearing it would be

necessary for him to submit a sworn statement as to whether he was then or ever had been a Communist (R. 27).

Kent thereafter filed a new passport application stating that he desired to visit England, Ireland, France, Switzerland, Denmark, Norway, Sweden, Finland, Italy, and Czechoslovakia for business and pleasure (R. 12, 77–78). The Director informed Kent's attorney that the informal hearing procedure was still open to Kent if he wished to make any statement in explanation or denial of the earlier adverse allegations (R. 32). Kent's attorney replied that Kent had "taken the position that the Passport Office's demand for an affidavit under Section 51.142 of the regulations [relating to an oath or affirmation as to Communist Party membership] is unlawful and that for that reason and as a matter of conscience, he will not respond to such a demand" (R. 33).

On November 8, 1955, Kent appeared with counsel for an informal hearing in the Passport Office (R. 34–64). In the course of the hearing, the Department put certain evidence in the record (R. 36–38, 40–43, 51, 53, 56), principally a copy of Kent's autobiography, *It's Me O Lord,* portions of which were read into the record (R. 46, 48–51) after Kent acknowledged that everything in the book was accurate (R. 44–47). Kent "refus[ed] to consider the allegations in the letter" (R. 47) previously sent to him by the Department, taking the position that as an American citizen he was entitled to a passport, and that consequently any matters unrelated to the question of citizenship were irrelevant to the Department's con-

sideration of his application (R. 44–48, 55–57, 61–63). Kent was again asked at the hearing to submit a sworn statement relative to membership in the Communist Party, in accordance with the regulations; he again refused to comply with this request (R. 57–59, 62–63).

Accordingly, the Director informed Kent by letter that the Department would give no further consideration to his application until such time as he was willing to comply with the passport regulations (R. 72–73).

(2) Kent filed his complaint in the District Court on December 14, 1955 (R. 2–4). In support of a motion for judgment on the pleadings or in the alternative for summary judgment, the Secretary of State filed an affidavit of the Director of the Passport Office, Miss Frances Knight (R. 76–84), relating to the foregoing facts and stating that Miss Knight deemed it necessary to require an affidavit from Kent "because of information set forth in (*a*) government publications, news reports and other public sources; (*b*) records of the Department of State and confidential reports from its officers in foreign countries; and (*c*) confidential reports from another agency of the Government * * *" (R. 79). Miss Knight's affidavit recited a detailed summary of the information from public sources (R. 79–83), including evidence that Kent had been a consistent supporter of at least 85 Communist-associated organizations, according to Congressional Committee reports, among them 23 organizations cited by the Attorney General as "Communist" (R. 79). Miss Knight listed the names of these or-

ganizations and of others, together with Kent's connections with the organizations and the offices held by him therein (R. 79–80). Miss Knight further quoted from public testimony of former Communist Party members, one of whom, Benjamin Gitlow, a former vice-presidential candidate on the Communist Party ticket, testified that Kent was a Communist, and another of whom, Maurice Malkin, had testified that if Kent was not a Communist Party member he was "very close to them" (R. 81). The affidavit also set forth the information obtained from the records of the Department of State and from reports from its diplomatic and consular officers abroad (R. 83–84), and concluded by stating that "[c]onfidential reports from another agency of the Government show *inter alia*, that plaintiff often attended special Communist Party meetings in Chicago, Illinois" (R. 84).

The District Court ruled that the passport regulations were valid (R. 84), granted summary judgment for respondent, denied Kent's motions for summary judgment and for a preliminary injunction, and dismissed the complaint (R. 85).

(*b*) *Walter Briehl.*—(*1*) Dr. Walter Briehl, a psychiatrist, was issued in 1953 a passport (R. 163) which expired in May 1955; and in April 1955 he filed a renewal application (R. 109–110, 163). The Director of the Passport Office informed Briehl that his request was being considered under the provisions of the passport regulations relating to affiliations with the Communist movement, stating that "it would be helpful to the Department if you would furnish an

affidavit setting forth whether you are now or ever have been a Communist, and explain your connections with" certain named organizations (R. 117–118).

Replying to this letter, Briehl's attorney stated that his client refused to submit the affidavit requested, stating that "[y]our demands and the vague and formless standards of the passport regulations under which you purport to act are palpable violations of [Briehl's] Constitutional rights, including, but not limited to, the First, Fifth, Ninth and Tenth Amendments" (R. 118). The Director then sent Briehl a letter tentatively disapproving his application on the ground that such renewal was precluded under the provisions of Section 51.135 of the regulations (relating to persons supporting the Communist movement), and informing him of the reasons for the disapproval "insofar as the security regulations will permit" (R. 120). After stating that it has been alleged that Briehl was a Communist, the Director set forth in greater detail the allegations previously communicated (R. 120–121), advising Briehl that he might present his case informally to the Passport Office and informing him that, whether or not he requested a hearing, it would be necessary for him to submit a sworn statement as to whether he was then or had been a Communist (R. 121).

Briehl's attorney replied that Briehl did not choose to offer any evidence in support of his application "unless and until" he was confronted with the persons who had furnished the adverse allegations (R. 122–123); but he thereafter requested a hearing (R. 125–126). An informal hearing was held in the Pass-

port Office on August 30, 1955, for the purpose of affording Briehl an opportunity to explain or deny the allegations (R. 127–150). Briehl appeared with counsel and took the position that the subject matter of the allegations was irrelevant to the Department's consideration of his passport application, and also that he was under no obligation to reply to these allegations by way of affirmation or denial until he had been confronted with the evidence and witnesses upon which the allegations were based (R. 131–138). His attorney raised three objections: (1) "political affiliations" are irrelevant to Briehl's "right to practice medicine" and to travel abroad in the pursuit of that practice (R. 132); (2) "every American citizen has the right to travel regardless of politics" (R. 133–134); and (3) the Department of State must "confront us with the evidence against Dr. Briehl" (R. 134), it being "the Department's job to prove not only the facts with respect to each of these allegations but * * * to prove wherein each of these activities was wrong and wherein the activities were in violation of the laws of the United States" (R. 137). Briehl was again asked to submit an affidavit with respect to his present or past membership in the Communist Party as required by the regulations; he again refused to comply with his request (R. 141–147).

Following the hearing, the counsel for the Board of Passport Appeals stated in reply to inquiries by Briehl's attorney that it was his understanding that Briehl had appeared at the hearing in the Passport Office and had refused to execute the requested affidavit; that the Board had not been advised of any

further processing of Briehl's case within the Passport Office; and that in such circumstances the Board of Passport Appeals could not, under the regulations, entertain an appeal at that time (R. 158–159). On September 16, 1955, the Director of the Passport Office notified Briehl's attorney that, in view of Briehl's refusal to explain or deny the allegations concerning him and in view of his refusal to submit the required affidavit, the Department knew of no further action which it could appropriately take in his case (R. 159–160). In reply to further inquiries by Briehl's attorney, the counsel for the Board of Passport Appeals advised that the Board was established under Section 51.139 of the passport regulations to act on appeals from decisions adverse to passport applicants, and that the Board was unaware of any such adverse decision in Briehl's case (R. 162).

(2) Briehl filed his complaint in the District Court on November 16, 1955 (R. 100–103). The respondent filed an affidavit of the Director of the Passport Office, Miss Knight, in support of the Government's cross-motion for summary judgment (R. 163–168), setting forth the foregoing facts and stating that an affidavit from Briehl was still deemed necessary because of information "contained in reports of a confidential character furnished the Department by another agency of the Government indicating the following concerning" Briehl (R. 165–166):

> He was in 1945 a member of the Los Angeles County Communist Party; he held Communist Party meetings in 1950 in his medical offices; he contributed in 1936 and 1941 articles to the

publication "Social Work Today", which has been characterized as a Communist publication; and he contributed $1,000 in 1949 to the Civil Rights Congress Bail Fund to be used in raising bail on behalf of the convicted Communist leaders in New York City. In addition, these reports indicate that as of May, 1951, he was a member of the Hollywood Arts, Sciences and Professions Council, the Southern California Chapter of the National Council of Arts, Sciences and Professions, an organization cited by the Attorney General as Communist; that he had contact with the American Committee for the Protection of the Foreign Born, an organization cited by the Attorney General as Communist; and that he attended in 1945, while an officer in the Army, meetings of the Bookshop Association, St. Louis, Missouri, which is reported to have been dominated by the Communist Party in the St. Louis area.

The District Court was of the view that Briehl's case was indistinguishable from Kent's and ruled as it had in that case (R. 169–170; see *supra*, p. 9).

3. THE OPINIONS IN THE COURT OF APPEALS

The Court of Appeals, after hearing argument on the two cases before a three-judge panel, reset the cases for argument *en banc* and affirmed the judgments of the District Court. There was no opinion of the court as such, the eight judges rendering five separate opinions in the *Briehl* case and reaffirming their views in the *Kent* case. Five judges voted to affirm, one to remand for further consideration by the Secretary, and two judges voted to reverse (R. 172). The opinions in *Briehl* were as follows:

(a) Judge Prettyman, joined by Judges Miller, Danaher and Bastian, was of the view that "the critical problem in the case * * * is * * * whether the Secretary of State may decline to issue a passport to a person who refuses to admit or deny that he is a member of the Communist Party * * * [o]r to state the problem in different terms, it is whether membership in or adherence to the Communist Party is a valid subject of inquiry prerequisite to the issuance of a passport under world conditions" (R. 198). Judge Prettyman answered these questions in the affirmative, ruling that the Secretary of State's "long-recognized power to refuse a passport" (R. 188) under the "broad discretion declared in" 22 U. S. C. 211a (R. 186) had been validly utilized by Congress in enacting the travel control provisions of 8 U. S. C. 1185 (R. 185–188). He held that these two statutes, buttressed by the war power and the combined Executive and Congressional powers in the field of foreign affairs, and considered in the light of the nature of the Communist movement and of world conditions, validated the Secretary's substantive regulations relating to Communist affiliations (R. 176–193). While recognizing that the restrictions impinged upon the "right to travel" and "indirectly upon the exercise of First Amendment rights" (R. 192), he concluded that, "balancing private right against public requirement * * * the reasonable requirements of national security * * * and the delicate characteristics of foreign relations outweigh the needs or desires of an individual to travel, when the Secretary finds the facts to be such as to preclude grant of a passport

under the regulation" (R. 192). Judge Prettyman's opinion upheld the affidavit requirement as implementing a valid inquiry into matters pertinent to the Secretary's ultimate decision (R. 195), and ruled that Briehl had no right to a hearing or decision on the merits until the requested information was furnished (R. 193–195). The opinion further held that the possible use of confidential information in reaching an ultimate decision on the merits did not render the prescribed administrative procedures void or obviate the necessity for compliance with their provisions (R. 195–198).

(*b*) Judge Washington, concurring in the result, agreed that the Secretary could validly require the affidavit "as a condition precedent to the rendering of a final decision" (R. 199), since such an affidavit requirement is normally valid if the information sought "is relevant to the exercise of a valid power" (*ibid.*). He agreed that, in enacting 8 U. S. C. 1185, Congress intended to authorize the Secretary of State to use his discretionary passport powers to control the travel of citizens in the national interest, and in particular (under the Internal Security Act of 1950) to authorize and require restriction of the travel of adherents to the Communist movement (R. 199–201). He further agreed that the Secretary has power to deny passports on grounds to which past or present Communist Party membership "may prove relevant" (R. 201) and therefore to require information on this subject as a part of the application (R. 201–203). Relying upon *Konigsberg* v. *State Bar*, 353 U. S. 252, he held that the Secretary need not decide the merits

of the application of one who refuses to furnish such information where, as here, the regulations clearly indicate the results of such a refusal. Since the court was not faced with an actual denial based upon an admission of present Communist Party membership, Judge Washington declined to pass upon the questions which would be raised by such a denial or upon the other issues discussed in Judge Prettyman's opinion.

(c) Judge Fahy, although dissenting, agreed that 8 U. S. C. 1185 delegated authority to control the travel of persons eligible to apply for passports—an authority which was valid when exercised consistently with due process in order to prevent the likelihood of harm to the national defense or the conduct of foreign affairs (R. 241–243). He further agreed that "[t]he information sought by the regulation is relevant to" a valid ground for passport denial (R. 243–244). But he read the facts as constituting "an actual denial of [the] application on the ground" of refusal to submit the affidavit, flowing "from the regulation and not from an independent conclusion of the Secretary * * *" (R. 243). It would not be reasonable, he said, and therefore not consistent with due process, for the Secretary to continue to withhold a passport in peacetime on the sole ground of refusal to furnish information, without more (R. 244–246). He would therefore have reversed and remanded, with directions to return the case to the Secretary for determinations as to whether or not the petitioner fell within one of the substantive categories for denial and whether or not his "travel would be reasonably likely

to be detrimental to the national defense or to the conduct of our foreign relations" (R. 245–246), determinations which could take into consideration the refusal to furnish information (R. 245).

(*d*) Judge Bazelon, in a dissenting opinion (R. 204–240) concurred in by Chief Judge Edgerton, disagreed with the majority on the threshold issue of the Secretary's substantive authority to restrict the travel of citizens through the exercise of his passport powers. He summarized his conclusions as follows (R. 239):

> * * * (1) [T]he President has not delegated to the Secretary of State the power to decide which Americans may travel and which may not; (2) neither of the two statutes relied on by the Secretary as a source of such power—22 U. S. C. § 211a and 8 U. S. C. § 1185—grants the power, in terms, either to the President or to the Secretary; (3) a construction of either or both of the statutes as granting the power would conflict with other expressions of congressional policy and would raise constitutional doubts of the utmost gravity, especially to the extent that eligibility is made to depend upon matters of political belief and association; (4) since the power was not conferred by statute, the President does not possess it, for it is not one of the powers inherent in his office.

(*e*) Chief Judge Edgerton, in a separate dissenting opinion (R. 240–241), agreed with Judge Bazelon but added that "the Secretary should be directed to issue a passport" (R. 240).

SUMMARY OF ARGUMENT

I

A. The passport has been recognized for well over a century as an essentially "political document" issued by the Secretary of State, in his discretion, as an aspect of his duties as chief officer under the President in the field of foreign affairs. Although passports were originally issued by the Secretary without congressional authorization or control, Congress enacted a passport statute in 1856 which recognized the Secretary's existing powers and practice and made it unlawful for others to issue passports. This statute, in force today as reenacted and amended, provides that "[t]he Secretary of State may grant and issue passports" under Presidential regulation (22 U. S. C. 211a). For decades the statute has been universally interpreted by all branches of the Government as lending congressional sanction to the Secretary's discretionary power to deny passports to certain citizens. For example, at least since 1907 the passport regulations of the President have provided that the Secretary may refuse to issue passports in his discretion. In its reenactments of the statute, Congress has presumably accepted this interpretation of the statute, as have all the judicial decisions on the subject. In *Perkins* v. *Elg*, 307 U. S. 325, 350, this Court definitively recognized "the Secretary's discretion with respect to the issue of a passport" to a citizen.

As an adjunct of this substantive power and by Presidential delegation of rulemaking authority, the Secretary has validly issued regulations defining categories of citizens to whom passports will be denied

and requiring information from passport applicants relevant to these categories.

B. The long-recognized passport discretion of the Secretary has been utilized by Congress since 1815 as the vehicle to effectuate control of the travel of citizens abroad, in the interest of national security during emergency periods. Section 215 of the Immigration and Nationality Act of 1952, c. 447, 66 Stat. 163, 190 (8 U. S. C. 1185), makes it unlawful for a citizen to depart from or enter the United States, in time of war or proclaimed national emergency, "unless he bears a valid passport". The statute is virtually identical to statutes passed during the War of 1812 and World War I. The latter statute remained on the books during the period between the wars and was amended in 1941 to make it subject to invocation during the then-existing pre-Pearl Harbor emergency, as well as during wartime. The reenactment in 1952 made the statute subject to invocation during any proclaimed emergency. On its face, the statute can only be read as authorizing the Secretary of State to exercise his traditional passport discretion so as to control the departure and entry of individual citizens; any other reading renders the statute completely meaningless. Moreover, both the legislative history of the 1918 and 1941 enactments, and the administrative practice, make it plain that Congress intended to authorize the denial of passports to individual citizens in order to control their travel in the interest of the national defense and foreign policy in time of emergency.

C. The restrictions on travel contained in this statute are now in effect pursuant to the Presidential proclamation of a state of emergency, based upon the threat of "world conquest by communist imperialism", in 1950, and the Presidential invocation of the statutory restrictions, based upon "the exigencies of the international situation and of the national defense", in 1953.

D. The regulations of the Secretary of State denying passports on grounds of Communist Party membership or activity are designed to "promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement" (22 CFR, 1956 Supp., 51.135). This aim is clearly within the limitations of the statutory delegation of emergency travel control authority. In issuing the regulation in 1952, the Secretary was motivated by the long history of passport abuse in furtherance of the aims of the Soviet Union by adherents of the Communist movement, both before World War II (see, *e. g., Browder* v. *United States,* 312 U. S. 335; *Warszower* v. *United States,* 312 U. S. 342) and thereafter; by judicial and legislative findings on the nature and purposes of the world Communist movement indicative of the purposes for which Communists may well use the right to travel abroad; and by a specific congressional finding in 1950 that "travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of

activities to further the purposes of the Communist movement" (64 Stat. 988). The Secretary's policy of controlling the travel of Communists has found support from competent observers both within and without the Government—including observers who have been critical of some aspects of the administration of that policy. Such control is plainly a reasonable means of combatting the various aspects of Communist subversion, espionage, and other activities detrimental to this nation's safety, in the context of the world situation and of the obvious value which Communists place upon travel and passports in the furtherance of their aims. The policy is not, as petitioners argue, in conflict with congressional will as expressed in the Internal Security Act of 1950; to the contrary, it implements that will.

E. Clearly, the Secretary of State, having the substantive authority we have just outlined, may require a passport applicant to submit an affidavit with respect to present or near-past Communist Party membership, whether or not present membership is alone a sufficient basis for denial of an application. 22 U. S. C. 213 prohibits the issuance of a passport until the applicant has submitted an application containing all the factual information required by the statutes and regulations, and the regulations require, if deemed necessary, the submission "as a part of his application" of a statement "with respect to present or past membership in the Communist Party" (22 CFR, 1956 Supp., 51.142). Since petitioners have not submitted the affidavit "deemed necessary" in their cases, their applications are incomplete and no

passport may issue. This affidavit requirement is subject to none of the infirmities claimed by petitioners. As is the case with application forms in innumerable other areas in which the exercise of a right or privilege is subject to reasonable regulation through a license or permit requirement, the affidavit here is merely a factual inquiry into matters relevant to a valid ground for denial. The inquiry is into conduct, not beliefs; it "is intended to prevent future action rather than to punish past action". *American Communications Ass'n.* v. *Douds,* 339 U. S. 382, 414. The affidavit is not a set form requiring the applicant to deny certain past conduct or be denied a passport. For these reasons, the affidavit contains none of the aspects of an *ex post facto* law, of a bill of attainder or of a "test oath" which petitioners seek to attach to it. Nor is the inquiry invalid even if present Communist Party membership is merely a relevant and not a decisive factor in determining eligibility for a passport. If membership is relevant, inquiry may be made; and if, after clear warning that no decision upon the application will be made until the inquiry is answered, the information is still withheld, it is lawful to terminate the administrative processing of the application. Cf. *Konigsberg* v. *State Bar,* 353 U. S. 252.

II

The denial of passports for foreign travel on grounds related to present or near-past Communist Party membership is not subject to constitutional objections.

A. The Constitution is no barrier to the congressional imposition of reasonable restrictions upon the travel of citizens, as this Court has recognized. *Blackmer* v. *United States*, 284 U. S. 421.

B. Here, Congress has delegated this power in a statute (8 U. S. C. 1185) invoking the war power and using as the control device the passport authority of the Secretary of State, which derives from the foreign affairs power. In view of the nature of these two powers, the requirements of the situation which Congress intended to remedy, and the long history of virtually identical enactments, the statute is not void for lack of adequate standards. Indeed, the Court has already upheld the statute as it applies to aliens against just such an attack. *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537.

C. Finally, the First Amendment rights of petitioners would not be violated if the Secretary were to consider Communist Party membership in denying them passports and thereby restricting their travel. Even if the purported purpose of travel is innocent, it is not unreasonable to assume, in the present perilous time, that an applicant who is in fact an adherent of a foreign movement basically hostile to this country may use his travel in furtherance of that movement's objectives; and this reasonable assumption makes reasonable the restriction of such a person's travel. First Amendment rights are, of course, subject to reasonable infringement where they conflict with the right of the public to be protected from evils of conduct, as this Court has often held. More specifically, the Court has held that the "evils

of conduct" springing from the activities of the Communist movement permit inquiry into and governmental action based upon Communist Party membership of labor union leaders, public employees, and aliens, as well as sustaining convictions of conspiracy to organize the Communist Party. In the light of all the circumstances, the First Amendment does not require that the Secretary of State blind himself to Communist Party membership in passing upon passport applications.

ARGUMENT

INTRODUCTION

The Court has before it two passport cases set for hearing, Nos. 481 and 621. We are filing separate briefs in order to avoid confusion, since No. 481 itself involves what were originally two independent cases, though raising identical issues, and No. 621 also presents important distinct issues and will be argued separately. The basic legal issues underlying the Secretary of State's present passport policies, as they are challenged in these cases, are discussed in this brief. The additional questions raised in *Dayton*, No. 621, but not present in *Kent* and *Briehl*, No. 481, will be left for discussion in our brief in No. 621.

A. The fundamental issue in this case, No. 481, is whether the Secretary of State may at this time validly decline to issue a passport on grounds to which present (or near-past) Communist Party membership may prove relevant, and may therefore require applicants such as petitioners Kent and Briehl to furnish information as to their membership. These petitioners flatly refused to supply that information, and

accordingly passports have been withheld under the Secretary's regulations. They are therefore not free to travel beyond the Western Hemisphere. The controversy at the bar is posed by the petitioners' claims that they are legally entitled to passports, and thus to travel, regardless of their refusal to disclose such Communist associations, as against the Government's position that, under the current statutes and regulations, the Secretary can legally decline to issue passports to petitioners until they furnish the required information. That is the problem to be decided in No. 481; no other aspects of the State Department's passport policy or practices are involved in this case.

B. Petitioners' demands for relief are not based upon a claim to a judicially enforceable right to passports, as such. Rather, they rely upon an asserted "right to travel" which is now affected by the statutory requirement of a passport as a prerequisite to lawful departure from or entry into the United States in the existing emergency. It is this statutory nexus between passports and travel abroad on which petitioners ground their challenges to the action of the Department of State in refusing to continue to process their passport applications.[11] The first point in

[11] It could be said that the action of the Department of State has not as yet actually interfered with petitioners' travel rights; that the gravamen of their complaints is a challenge to the statute prohibiting departure or entry without a passport (8 U. S. C. 1185); and that the questions petitioners raise may properly be presented only in a criminal action for a departure or attempted departure without a passport. However, the Secretary of State has never taken this position in the courts below, and we do not now assert it as a ground for affirmance.

petitioners' brief (Pet. Br. in No. 481, pp. 18–24) is devoted to their "constitutional right to travel".

On that point, there is no controversy between the parties. For, while this Court has not yet decided whether the Constitution protects the travel of citizens across the boundaries of the nation as it protects their travel across state boundaries,[12] we do not challenge, but readily accept, the existence of a general "natural" or "constitutional" right to depart from or enter the country as an aspect of the "liberty" subject to the protections of the Constitution. We fully accede to the definitive ruling of *Shachtman* v. *Dulles*, 225 F. 2d 938, 941 (C. A. D. C.)—confirmed in substance in the opinions below—that there is a "right to travel" and that restraints on that right must conform to the Fifth Amendment.[13] Our position in these cases does not deny that principle, but rather rests on the claim that what the Secretary has done here accords with both the procedural and the

[12] See Art. IV, Sec. 2, of the Constitution; *Hess* v. *Pawloski*, 274 U. S. 352; *Williams* v. *Fears*, 179 U. S. 270.

[13] The Administrator of the Bureau of Security and Consular Affairs of the Department of State, of which Bureau the Passport Office is a subdivision, has recently stated (Roderic L. O'Connor, *The State Department Defends*, The Saturday Review, January 11, 1958):

> * * * The Department recognizes that [passport] denials can be, in practice, a limitation upon any "natural" right the citizen may have to travel.
>
> However, we believe that any such right, like all other rights, is subject to reasonable limitation in the national interest. We recognize that passport facilities can only be denied with scrupulous regard to the requirements of due process of law. * * * We believe that our present procedures meet this test.

substantive aspects of due process of law. *Shachtman* holds that the right to travel is "subject to the rights of others and to reasonable regulation under law" (225 F. 2d at 941). Our argument is that the particular requirements applied to petitioners constitute just such "reasonable regulation under law". We shall discuss both the statutory aspects of that problem, and the constitutional issues which have also been mooted.

I

THE SECRETARY OF STATE IS AUTHORIZED TO EXERCISE HIS DISCRETION IN REFUSING TO ISSUE PASSPORTS, SO AS TO RESTRICT FOREIGN TRAVEL, FOR REASONS RELATING TO PRESENT OR NEAR-PAST COMMUNIST PARTY MEMBERSHIP

The first issue before the Court is a statutory one:—whether Congress has delegated to the President and (either directly or indirectly) to the Secretary of State the power to restrict the travel of individual citizens through the withholding of passports on an individual basis. The basic passport statute provides that the Secretary of State "may grant and issue passports" to citizens (22 U. S. C. 211a); the travel-control statute makes it unlawful for a citizen to depart from or enter the United States "unless he bears a valid passport" (8 U. S. C. 1185). Six of the eight judges in the Court of Appeals read the first statute as authorizing such discretion in issuing passports, and the second statute as delegating power to control the travel of individual citizens through the exercise of that discretion; they also held that the delegation was constitutional. The dissenting opinions of Judge

Bazelon and Chief Judge Edgerton, holding that the second statute could not be read as a delegation of travel-control power, is fundamentally based upon their reading of the first statute, and the Secretary's passport power as not authorizing the issuance of passports on a discretionary basis (see, *e. g.*, R. 208–210). Petitioners similarly premise their statutory arguments upon the claim that the Secretary has a mere ministerial duty to issue passports to all citizen applicants.

Our position is that of the majority below:—Congress plainly intended in the travel-control statute (now 8 U. S. C. 1185) to make use of the traditional discretionary authority of the Secretary of State, under the long-existing passport statute (22 U. S. C. 211a), to issue or to decline to issue passports; that historical power, well-known to Congress, was to be the administrative mechanism through which travel abroad was to be regulated on an individual basis in time of war or emergency. In support of this view, we show, *first*, that the Secretary has always possessed and exercised broad discretionary authority in issuing passports; *second*, that the travel-control statute was designed to use this traditional discretion, and to delegate authority to the Secretary to control foreign travel by means of his established passport power; *third*, that the Secretary is now empowered, under those statutes and pertinent Executive Orders, so to administer the travel-control statute; *fourth*, that the Secretary may properly decline, in the exercise of his discretion, to issue passports for foreign travel to persons who are members of or affiliated with the

Communist Party; and, *fifth,* that in any event it is within the Secretary's authority to require information as to present and near-past Communist Party membership from passport applicants.

A. THE SECRETARY OF STATE HAS ALWAYS POSSESSED AND EXERCISED BROAD DISCRETIONARY POWER TO GRANT OR DENY PASSPORTS

1. Passports issued by the United States have not changed their form or nature since the early days of the Republic.[14] This Court's earliest description of the passport appears in *Urtetiqui* v. *D'Arcy,* 9 Pet. 692, 699:

> * * * It is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request that the bearer of it may pass safely and freely, and is to be considered rather in the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact. * * *

See 3 Moore, *International Law Digest* (1906), 856; 2 Hyde, *International Law Chiefly As Interpreted And Applied by the United States* (1945), 1188; 17 Op. A. G. 674. A passport certifies the bearer "to be entitled to such protection as the Government can give to its citizens in foreign countries" (13 Op. A. G. 89, 91 (1869).[15] Among the purposes to which a passport regularly issued may customarily be put, in addi-

[14] See Hunt, *The American Passport* (1898), 77–80.

[15] Passports are now issued in the following language:

> I, the undersigned, Secretary of State of the United States of America, hereby request all whom it may concern to permit safely and freely to pass, and in case of

tion to its use in foreign countries, is as a document establishing citizenship for purposes of reentry into the United States, even in times when the passport itself is not a prerequisite to lawful entry. *Browder* v. *United States*, 312 U. S. 335; *Warszower* v. *United States*, 312 U. S. 342. While as a practical matter the passport may be considered the personal property of the person to whom it is issued, the Government has always asserted a paramount right to require its surrender or to cancel it for good and sufficient reasons.[16]

As the court below has earlier noted, "the issuance of passports throughout our history has been left to the judgment of the Secretary of State under Presidential regulation * * *". *Shachtman* v. *Dulles*, 225 F. 2d 938, 942. The Secretary's authority finds its origin in his executive powers as the chief officer under the President in the field of foreign affairs. From the early days of the Republic until the middle of the 19th century, the Secretary of State issued passports without any legislative authorization,[17] as recognized by

need to give all lawful aid and protection to [bearer] a citizen of the United States.

See also 3 Hackworth, *Digest of International Law* (1942), 435–436; *Communist Party of the United States* v. *Subversive Activities Control Board*, 223 F. 2d 531, 555 (C. A. D. C.), reversed on other grounds, 351 U. S. 115.

[16] 3 Hyde, 1189; 3 Hackworth, 438, 470; see also 22 CFR 51.75, App. A, *infra*, p. 110.

[17] Stuart, *Safeguarding the State Through Passport Control*, 12 Dept. of State Bull. (1945) 1066; Hunt, 77. During that period Congress had, however, enacted legislation which specifically took cognizance of the fact that the Secretary was issuing passports, one statute in 1803 making it unlawful for State Department representatives abroad knowingly to issue a

this Court in 1835 in *Urtetiqui* v. *D'Arcy*, 9 Pet. 692, 699.

During that period, however, other Federal officers, as well as State and local officials, and even notaries public, undertook to issue certificates of citizenship and documents in the nature of letters of introduction to foreign officials requesting treatment according to the usages of international law. In order to put an end to this practice, Congress in 1856 passed the statute which remains today, in only slightly modified form, the basic passport statute. The statute is now codified as follows (in pertinent part) in 22 U. S. C. 211a:[18]

> The Secretary of State may grant and issue passports * * * under such rules as the President shall designate and prescribe for and on

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passport to an alien, certifying that he is a citizen (2 Stat. 205), and another in 1815 regulating travel through passport issuance (3 Stat. 199; see the text, *infra*, at p. 44). In addition, the Senate in 1850 ratified a treaty calling for the issuance of passports to citizens going to Switzerland. 2 Malloy, *Treaties*, 1763; 1765.

[18] The original statute provided that "the Secretary of State shall be authorized to grant and issue passports * * * nor shall any passport be granted or issued to, or verified for, any other persons than citizens of the United States * * *", making it a misdemeanor for other unauthorized officials to issue passports (Section 23 of the Act of August 18, 1856, c. 127, 11 Stat. 52, 60–61). The first edition of the Revised Statutes (1874) divided this section into a number of separate sections, Section 4075 adopting the present "may grant and issue" language. Judge Bazelon's dissenting opinion notes that there is no significance in the change in language from "shall be authorized" to "may": "the effect is the same" (R. 211, note 16; see also Judge Prettyman at R. 186).

behalf of the United States, and no other person shall grant, issue, or verify such passports.

This statute served to center the passport power in the Secretary of State and to give him sole authority in this field. The Attorney General stated three years later that "[t]he impositions practiced upon the illiterate and unwary by the fabrication of worthless passports, led to the passage of the law * * *".[19] The statute thus stands as a congressional recognition, implementation, and confirmation of an existing executive authority, rather than as a new delegation of congressional power, or a limitation or expansion of powers already possessed by the Secretary.

2. In view of the source of the Secretary's power and the broad language of the basic statute, it has long been recognized that "[t]he issuance of passports is a discretionary act on the part of the Secretary of State, and he may, for reasons deemed by him to be sufficient, direct the refusal of a passport to an American citizen * * *". Hyde, 1195; see also Hackworth, 498; Moore, 919–923.[20] This discretion has been confirmed and accepted by all three branches of the Government.

(*a*) The early views of the Executive Branch were summarized in an opinion of Attorney General Knox in 1901 in answer to an inquiry from the Secretary of State as to whether it was his "duty to issue a pass-

[19] 9 Op. A. G. 350, 352 (1859); see also Borchard, *The Diplomatic Protection of Citizens Abroad* (1915), 496; Hunt, 36-42; 3 Moore, 862, *et seq.*

[20] Borchard states that "the Secretary of State is empowered by Congress to refuse, in his discretion, to issue a passport". Borchard, 364; see also pp. 494–495.

port to" a particular applicant (23 Op. A. G. 509).[21] After concluding that the applicant was in fact a citizen of the United States, the Attorney General advised that "a passport * * * may, in your discretion, be granted or withheld" (*id.* at 511; emphasis added):

> * * * The act of Congress which defines your duty in the matter of the issuance of passports expressly says "the Secretary of State may grant and issue passports." The provision, therefore, is not in terms mandatory, and I know of no law which gives to the citizen a right to a passport.
>
> Attorney-General Hoar, in an opinion dated June 12, 1869 (13 Opin., 89, 92), said:
>
> > I do not understand that the granting of passports from your Department is obligatory in any case, but is only permitted where it is not prohibited by law.
>
> * * * * *
>
> Substantial reasons exist for the use by Congress of the word "may" in connection with authority to issue passports. Circumstances are conceivable which would make it most inexpedient for the public interests for this country to grant a passport to a citizen of the United States. For example, if one of the criminal classes, *an avowed anarchist for instance,* were to make such application, the public interest might require that his application be denied.

[21] The following history of executive assertions of discretionary passport powers does not include those in times of war or emergency, which are discussed *infra*, at pp. 44–45, 49, 51–52.

The general instructions in regard to passports issued by the Department of State on May 1, 1886, included the following provision (2 Wharton, *International Law Digest* (1886), 469, 471):

> The issuing of passports is at the discretion of the Secretary (Rev. Stat., § 4075), and they will not be granted to persons engaged in violation of the laws of the United States, e. g., Mormon propagandists.

This provision was changed in the Passport Rules of 1903 to state that the Secretary would exercise "the right in his discretion to refuse to issue a passport * * * towards anyone who, he has reason to believe, desires a passport to further an unlawful or improper purpose".[22]

It appears that the 1903 rules referred to by Moore were issued by the President. In any event, the President has issued "Rules Governing the Granting and Issuing of Passports in the United States", confirming the Secretary's discretion, at least since 1907. The Rules issued by President Theodore Roosevelt on June 13, 1907, in Executive Order No. 654, provided that "No one but the Secretary of State may grant and issue passports in the United States (Revised Statutes, Sections 4075, 4078), and he is empowered to refuse them in his discretion", and further that "The Secretary of State is authorized to make regulations on the subject of issuing and granting passports additional to these rules and not inconsistent with them".[23] The substance of these provisions has

[22] 3 Moore, 902.

[23] Executive Order No. 654.

been continued in Passport Rules issued by succeeding Presidents, and is today in force under Rules promulgated by President Franklin D. Roosevelt in 1938.[24]

The Secretary's discretionary power has not only been long asserted but it has been frequently exercised in refusing to grant passports to particular citizens, since at least as early as 1819.[25] For many years, however, neither the President nor the Secretary appear to have thought it desirable to establish by regulation specific categories of citizens with respect to whom this discretion would be exercised; it was then the view of the Department that "[t]he causes of refusal to issue passports to citizens depend upon con-

[24] See Executive Order No. 2119–A, January 12, 1915 (reprinted in Borchard at 508–511); Executive Order No. 2286–A, December 17, 1915 (reprinted in *For Rel.*, 1915, Supp., 912); Executive Order No. 2362–A, April 7, 1916 (reprinted in *For. Rel.*, 1916, Supp. 787); Executive Order No. 2519–A, January 24, 1917 (reprinted in *For. Rel.*, 1917, Supp. 1, 573); Executive Order No. 4382–A, February 12, 1926 (reprinted in *Hearings Before the House Committee on Foreign Affairs on H. R. 11947* (1926), 69th Cong., 1st Sess., pp. 19–25); Executive Order No. 4800, January 31, 1928; Executive Order No. 5860, June 22, 1932; Executive Order No. 7856, March 31, 1938, 3 F. R. 799, 22 CFR 51.75 (App., *infra*, p. 110).

It is noteworthy that Executive Orders No. 2286–A, 2362–A, and 2519–A all required that applicants submit documentary evidence that it was "imperative" that they travel abroad. See *infra*, p. 45.

[25] Note, *Passports and Freedom of Travel; The Conflict of a Right and a Privilege*, 41 Geo. L. J. 63, 73, note 43. For specific instances of such refusals, see 3 Moore, 919-923; Hyde, 1195–1197; Hackworth, 498–512. The section in Hackworth is entitled "Grounds of Refusal" and contains such subheadings as "Conduct and character", "Unlawful activities", "Conviction of crime", "Paroled criminals", "Use of foreign passports", "Participation in politics [abroad]", etc.

siderations applicable to individual cases and are not the subject of general rules." [26]

(*b*) Congressional approval of this discretionary interpretation of the passport statute (and the underlying power) is to be inferred from the several reenactments of the basic 1856 Act. The 1869 opinion of Attorney General Hoar (13 Op. A. G. 89, referred to in Attorney General Knox's opinion, *supra*, p. 33) had been rendered before Congress, in 1874, changed the statutory language from "shall be authorized to grant and issue" to "may grant and issue" (Revised Statutes, Section 4075). This language was continued in the recodification of June 30, 1926 (44 Stat., Part 1, p. 657, then codified as 22 U. S. C. 211), and in the reenactment of July 3, 1926 (c. 772, 44 Stat., Part 2, p. 887; see also 44 Stat., Part 1, p. 1951; codified as 22 U. S. C. 211a). All during this time the Secretary's view of his authority was well known. In these circumstances, the repeated reenactment of the statute, "which had previously received long continued executive construction, is an adoption of such construction". *United States* v. *Hermanos y Compania*, 209 U. S. 337, 339; see also *United States* v. *Allen-Bradley Co.*, 352 U. S. 306, 308–311; *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 544–549; *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 310–315; *United States* v. *G. Falk & Brother*, 204 U. S. 143, 150, 152; cf. *United States* v. *Korpan*, 354 U. S. 271, 276.

[26] *For. Rel.*, 1907, Part 2, 1082, 1083.

The executive interpretation remained unchanged after the last reenactment in 1926.[27] As we have noted (*supra*, p. 35), President Franklin D. Roosevelt again declared that "The Secretary of State is authorized in his discretion to refuse to issue a passport * * *" in Executive Order No. 7856, which is still in force (3 F. R. 799; 22 CFR 51.75, App., *infra*, p. 110). In 1941, Secretary of State Hull reasserted this discretion in a section of an order[28] which was incorporated into President Truman's Proclamation No. 3004 of January 17, 1953, which is also still in force.[29]

(*c*) It is not surprising that a power so universally recognized as wholly discretionary, and therefore essentially non-justiciable, did not receive judicial confirmation until 1923, when the Court of Appeals for the Eighth Circuit decided *Miller* v. *Sinjen*, 289 Fed. 388. There, the court held that "a finding that plaintiff had ceased to be a citizen of the United States was not necessary to the action of the State Department in denying him a passport, for the reason that the granting of a passport by the United States is, and

[27] In an opinion of August 9, 1926, the Solicitor for the Department of State commented (3 Hackworth, 467–468):

> The Department has consistently held the view that the issuance of passports is wholly within the discretion of the Secretary of State, and I know of no instance in which an effort has been made to compel the Secretary to issue a passport.

[28] Departmental Order No. 1003, November 25, 1941, Section 58.10, 6 F. R. 6069, 6070, 22 CFR 53.8; see App., *infra*, pp. 111–112.

[29] Section 1, 67 Stat. C31; see App., *infra*, pp. 105, 107.

always has been, a discretionary matter * * *. This has been the law both prior to the passage of any statute relating to the granting of passports, as well as subsequent to such statutes, now embodied in sections 4075, et seq. Revised Statutes * * *" (289 Fed. at 394–395).

In 1939, this Court, in *Perkins* v. *Elg*, 307 U. S. 325, added its own authoritative confirmation of the Secretary's discretionary power. In that case, Miss Elg had sued both the Secretary of Labor—at that time responsible for immigration and deportation matters—and the Secretary of State, complaining that, on the basis of allegedly erroneous determinations that Miss Elg was not a citizen, the former sought to deport her and the latter refused to renew her passport. The relief sought against the Secretary of State was an injunction against refusing to issue her a passport upon the ground that she was not a citizen. The Court of Appeals affirmed the District Court's entry of a decree declaring that Miss Elg was a citizen but directing that the complaint be dismissed as to the Secretary of State because of his official discretion in the issuance of passports (99 F. 2d 408 (C. A. D. C.)). This Court, while affirming on the issue of citizenship, modified the decree by striking the dismissal as to the Secretary of State so as to include him in the declaratory provision of the decree, on the following ground (307 U. S. at 349–350; emphasis added):

> * * * The dismissal was upon the ground that the court would not undertake by mandamus to compel the issuance of a passport or control by means of a declaratory judgment

> the discretion of the Secretary of State. But the Secretary of State, according to the allegation of the bill of complaint, had refused to issue a passport to Miss Elg "solely on the ground that she had lost her native born American citizenship." The court below, properly recognizing the existence of an actual controversy with the defendants (*Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227), declared Miss Elg "to be a natural born citizen of the United States," and we think that the decree should include the Secretary of State as well as the other defendants. *The decree in that sense would in no way interfere with the exercise of the Secretary's discretion with respect to the issue of a passport but would simply preclude the denial of a passport on the sole ground that Miss Elg had lost her American citizenship.*

The Secretary could no longer refuse to issue a passport on the ground of non-citizenship—a judicial question which had been determined in Miss Elg's favor—but he would still be free to exercise his "discretion with respect to the issue of a passport" by denying her a passport, if he deemed it necessary, on *other* grounds.[30]

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[30] This interpretation of the *Elg* decision has been consistently followed by this Court. *Arenas* v. *United States*, 322 U. S. 419; *McGrath* v. *Kristensen*, 340 U. S. 162, 169–171; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 185, note 5 (Mr. Justice Jackson, concurring: "That was an action to mandamus the Secretary of State to issue a passport, to which it was conceded Miss Elg had no legal right, its issuance being wholly within Executive discretion which the courts would not attempt to control"). See also *Gillars* v. *United States*, 182 F. 2d 962 (C. A. D. C.).

Not until 1951, when travel controls were in effect, was there a suit to compel the Secretary of State to issue a passport. *Bauer* v. *Acheson*, 106 F. Supp. 445 (D. D. C.). In that case, a three-judge District Court, while holding that the requirement of a passport to leave or enter the country subjected passport issuance to due process requirements, stated (106 F. Supp. at 451-452):

> The court recognizes that in the matter of passports the executive department of the government, acting through the Secretary of State, must necessarily be accorded wide discretion in determining when and where the protection of the United States may be extended to an American citizen travelling abroad, and that it should also have discretion to deny such protection to persons whose activities abroad might be in conflict with its foreign policy. * * *

The ensuing series of cases in the court below have all come to essentially the same conclusion, either expressly or by necessary implication.[31]

3. The Secretary of State, possessing this broad discretion, may properly provide for the orderly exercise of his passport powers by issuing regulations defining categories of citizens to whom passports will be denied, and requiring information from passport applicants.

[31] See (in addition to the present case and the decisions below in No. 621) *Communist Party of the United States* v. *Subversive Activities Control Board*, 223 F. 2d 531, 535 (specific reference to persons affiliated with the Communist movement), reversed on other grounds, 351 U. S. 115; *Dulles* v. *Nathan*, 225 F. 2d 29; *Shachtman* v. *Dulles*, 225 F. 2d 938; *Robeson* v. *Dulles*, 235 F. 2d 810, certiorari denied, 352 U. S. 895; *Boudin* v. *Dulles*, 235 F. 2d 532; *Kraus* v. *Dulles*, 235 F. 2d 840; *Stewart* v. *Dulles*, 240 F. 2d 602.

The power to "grant and issue passports" is lodged in the Secretary himself under Section 211a of Title 22, subject only to "such rules as the President shall designate and prescribe." And since the Secretary thus possesses the substantive passport power, he also has the subsidiary power to issue regulations governing its exercise, so long as such regulations do not conflict with those of the President.[32] Moreover, redelegation to the Secretary of the rule-making power vested in the President by 22 U. S. C. 211a has been in effect at least since President Theodore Roosevelt's 1907 rules (*supra*, p. 34), and is now in effect under the provisions of both Executive Order 7856 (22 CFR 51.77) and Section 1 of Proclamation No. 3004 (App., *infra*, p. 107).[33]

It follows that the Secretary—possessed as he is of both his own power under the statute and of the

[32] It may well be that Congress thought it appropriate to provide that the Secretary should act "under such rules as the President shall designate and prescribe" since Congress was granting authority to a subordinate of the President, rather than the President himself, and wished to make it clear that the subordinate's actions would, of course, be subject to the President's overriding supervision. It is not at all necessary to read the statute as placing *all* the rule-making power in the President.

[33] No problem of unlawful delegation is presented by this redelegation. The President may speak and act through his department heads, even where the authority exercised has been committed by Congress specifically to the President. Cf. *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 543; *Russell Co.* v. *United States*, 261 U. S. 514; *Hegler* v. *Faulkner*, 153 U. S. 109; *Wolsey* v. *Chapman*, 101 U. S. 755; *Williams* v. *United States*, 1 How. 290; *United States* v. *Eliason*, 16 Pet. 291.

residuum of the President's power—is authorized to issue regulations establishing prescribed categories of citizens with respect to whom the Secretary's discretion shall be exercised. This he has done in Section 51.135 of the Passport Regulations,[34] the substantive regulation (here at issue) bearing on the issuance of passports to persons supporting the Communist movement. In promulgating that regulation, Secretary of State Acheson expressly invoked the delegation of rule-making power from Congress to the President (22 U. S. C. 211a) and the presidential re-delegation of that power to himself (22 CFR 51.77). See 17 F. R. 8013, 22 CFR,[35] 1956 Supp., at p. 98; App. A, *infra*, p. 112, note 1.[35]

In view of this history,[36] there is no basis for petitioner's contention, adopted in Judge Bazelón's dissent below (R. 208–210), that "for almost one hundred years the Executive construed the passport statutes as authorizing only the power to issue regulations of an administrative character" (Pet. Br. 27), and that therefore the basic passport statute (22 U. S. C. 211a) must be so construed.[37]

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[34] 22 CFR, 1956 Supp., 51.135, App., *infra*, pp. 112–113.

[35] Contrary to petitioners' contention (Pet. Br. 30–31), the citation of this authority was obviously to indicate the Secretary's *rule-making* authority—since that is the power conferred by those provisions—and not to support the substantive discretionary power which the regulations implemented. The latter authority, deriving from the aggregate of historically recognized powers which we have discussed above, required no citation.

[36] See also *infra*, p. 44ff, for further instances of the historical exercise of the passport power.

[37] Petitioners' reliance upon the testimony describing the nature of the "rules" contemplated by Section 211a as "ad-

B. THE TRAVEL CONTROL STATUTE (8 U. S. C. 1185) IS A DELEGATION OF AUTHORITY TO THE SECRETARY TO RESTRICT THE TRAVEL OF CITIZENS THROUGH PASSPORT DENIALS ON GROUNDS RELATED TO THE NATIONAL SECURITY IN TIMES OF WAR OR EMERGENCY

Section 215 of the Immigration and Nationality Act of 1952, c. 477, 66 Stat. 163, 190 (8 U. S. C. 1185)—taking the place of the similar prior statute—makes it unlawful for a citizen to depart from or enter the United States, in time of war or emergency, unless he bears a valid passport. This statute recognizes and makes deliberate use of the Secretary's traditional passport discretion, and delegates authority for its exercise so as to control the travel of individuals during emergency periods in the interest of

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ministrative rules," in *Hearings Before the House Committee on Foreign Affairs on H. R. 11947*, 69th Cong., 1st Sess. (1926) (Pet. Br. 26–27), is misplaced. The entire discussion at that hearing related to "administrative rules" and the need for keeping such rules flexible; at no point was the Secretary's traditional substantive discretion alluded to or disclaimed.

Judge Bazelon's quotation from the Secretary's brief in the court below (R. 207), in which he states that "the Secretary conceded that § 211a 'confers no substantive power' ", is subject to possible misintgrpretation. It was the Secretary's position below, as it is here, first, that Section 211a *conferred* no new substantive power whatever, but instead *confirmed* existing power in the Secretary (*supra*, p. 32); and, second, that the substantive power confirmed did not include substantive power to restrain the departure or entry of non-passport-bearing citizens, absent further legislation, but only the power to exercise discretion in issuing passports to citizens. Section 211a did, however, confer whatever "non-substantive" administrative power may have been lacking for the President, acting through the Secretary, to issue regulations respecting the exercise of his substantive powers.

Judge Bazelon's apparent acceptance of the argument that the Secretary has never had discretion to deny passports to citizens (R. 208–210) is difficult to reconcile with his later recognition of this discretion (R. 215, note 32, and R. 224).

the national security. Certainly, the statute was not intended or designed to strip the Secretary of his former discretion in issuing and denying passports. That very discretion was the vehicle chosen by Congress to effectuate travel control.

1. *Legislative history:* Congress has long felt the need to control travel in emergency periods, for it has enacted legislation to this end in times of war or great crisis since 1815.[38] In such enactments Congress has chosen the well-recognized discretionary passport power of the Secretary of State as the instrument through which such controls were to be made operative, by making it unlawful to undertake certain travel without a valid passport.

The 1815 statute (Section 10 of the Trading With the Enemy Act of 1815, 3 Stat. 199), passed just prior to the termination of the War of 1812, made it illegal for any citizen to "cross the frontier" into enemy territory "without a passport first obtained from the Secretary of State" or other specified officials. The next travel control statute did not appear until World War I, but during the Civil War the same result was accomplished without congressional sanction. Secretary of State William H. Seward issued an order prohibiting the departure from or entry into any port of the United States of any person who did not have a passport. A subsequent order pro-

[38] The House Report on the 1918 Act (see *infra*, pp. 45–48), in citing the need for legislation, states that "the Attorney General has formally ruled that neither the President nor the executive departments have power to curb the general departure and entry of travelers." H. Rept. No. 485, 65th Cong., 2d Sess., p. 2.

hibited the issuance of a passport to any citizen subject to military service, in the absence of the posting of a bond. Hunt, 49–54; 3 Moore, 1015–1021.

After the outbreak of World War I in 1914, President Wilson sought to prevent American citizens from unnecessarily placing themselves in belligerent areas by promulgating rules requiring that passport applicants submit documentary evidence sufficient to "satisfy the Department of State that it is imperative" that they go abroad.[39] There was no law, however, which prevented departure or entry without a passport. It was for this reason that Congress enacted, in 1918, the direct antecedent of the present travel control statute. Act of May 22, 1918, c. 81, 40 Stat. 559.[40]

The legislative history of the 1918 Act makes it absolutely clear that the Congress intended the Secretary of State to use his traditional passport powers to control the travel of Americans in the interest of the national security.[41] The House Foreign Affairs Committee, which added the section relating to the travel of citizens,[42] explained the bill as follows (H.

[39] See *For. Rel.*, 1915, Supp., 912; *For. Rel.*, 1916, Supp., 788; *For. Rel.*, 1917, Supp. 1, 575.

[40] Section 2 of this 1918 Act provided that after the prescribed Presidential proclamation "has been made and published and while said proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter or attempt to depart from or enter the United States *unless he bears a valid passport.*" (Emphasis added.)

[41] The 1918 Act provides meaningful legislative history, since the present statute is essentially a reenactment of that Act. Cf. *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 541.

[42] See 56 Cong. Rec. 6029.

ept. No. 85, 65th Cong., 2d Sess., pp. 2–3; emphasis
dded):

> The bill is intended to stop an important gap in the war legislation of the United States. * * *
>
> * * * American citizens and neutrals [are] perfectly free to come and go. No argument is necessary to indicate the probability that Germany will wherever possible employ renegade Americans or neutrals as her agents instead of employing Germans about whom suspicion would easily be excited. The danger of the transference of important military information causes the Government great anxiety, particularly as the Attorney General has formally ruled that neither the President nor the executive departments have power to curb the general departure and entry of travelers.
>
> New legislation is the only remedy. * * *
>
> * * * It will be observed that *citizens need not secure such permits as are required of aliens, but must bear valid passports. Passports will continue to be issued as at present by the Department of State,* and there is no reason to believe that any American citizen will be unduly inconvenienced by these restrictions. That some supervision of travel by American citizens is essential appeared from statements made before the committee at the hearing upon the bill. One case was mentioned of a United States citizen who recently returned from Europe after having, to the knowledge of our Government, done work in a neutral country for the German Government. There was strong suspicion that he came to the United States for no proper purpose. Nevertheless not only was it impossible to exclude him but it would now be impossible to prevent him from leaving the country if he saw fit to do so. The known facts in his case

are not sufficient to warrant the institution of a criminal prosecution, and in any event the difficulty of securing legal evidence from the place of his activities in Europe may easily be imagined.

The power vested in the President is broad and comprehensive. Nevertheless the bill itself defines all the infringements of its terms which may be criminal. It is only possible for the President, by prescribing limitations and exceptions, to diminish the number of crimes or the varieties of circumstances under which a criminal act may take place. In other words, the bill places a maximum limit beyond which its penal provisions may not be carried. This, together with the assurance from past experience that no act of the President will be unreasonable or oppressive, constitutes a sufficient guaranty that the powers granted will be fairly enforced. Beyond this the bill itself requires that all rules, regulations, and orders shall be reasonable.

It is essential to meet the situation that the Executive should have wide discretion and wide authority of action. No one can foresee the different means which may be adopted by hostile nations to secure military information or spread propaganda and discontent. It is obviously impracticable to appeal to Congress for further legislation in each new emergency. Swift Executive action is the only effective counterstroke.

The committee was informed by representatives of the executive departments that the need for prompt legislation of the character suggested is most pressing. There have recently been numerous suspicious departures for Cuba

> which it was impossible to prevent. Other *individual cases* of entry and departure at various points have excited the greatest anxiety. This is particularly true in respect of the Mexican border, passage across which can not legally be restricted for many types of persons reasonably suspected of aiding Germany's purposes. * * * Your committee were also of the opinion that the bill is, and therefore reported it as, an emergency war measure.

In the debates on the floor of Congress it was recognized that "a passport can not be claimed by a citizen as a matter of right. Passports are granted only at the will of an administrative officer. No court will force that officer to grant a passport". 56 Cong. Rec. 6063. These characteristics of passports were recognized to be the fundamental premise of the statute (56 Cong. Rec. 6030):

> Mr. MOORE of Pennsylvania. Well, then, the matter is left open so that the President has discretion to say who shall or who shall not have passports?
>
> Mr. FLOOD. That is the purpose of the law.
>
> Mr. MOORE of Pennsylvania. The gentleman advances this as a war measure and puts it on that ground?
>
> Mr. FLOOD. Absolutely. It is limited to the duration of the war.

The debates further stressed that the individuals at whom the legislation was aimed were persons suspected of engaging in activities inimical to the conduct of the war, whether or not sufficient proof of such

activities existed to warrant prosecution under the statutes relating to espionage, subversion, treason, or similar crimes. See 56 Cong. Rec. 6029–6030, 6063–6067, 6191–6195, 6248.

The 1918 statute was invoked by Presidential Proclamation No. 1473 of August 8, 1918, which provided in part as follows[43] (40 Stat. 1829, 1831; emphasis added):

> 1. No citizen of the United States shall receive a passport entitling him to leave or enter the United States, unless it shall *affirmatively appear that there are adequate reasons for such departure or entry* and that such departure or entry is *not prejudicial to the interests of the United States.*

This statute was effective only in wartime, and the controls terminated on March 3, 1921.[44] In 1941, after President Roosevelt had proclaimed an unlimited national emergency,[45] Congress amended the 1918 Act to provide, *inter alia*, that the Act could be invoked during the then-existing emergency.[46] The

[43] See Executive Order No. 2932, *For. Rel.*, 1918, Supp. 2, 815, for the implementing regulation. For the history of those regulations and their operation during World War I, see Hyde, pp. 1202–1206.

[44] Public Resolution No. 64, 41 Stat. 1359, *et seq.*

[45] Proc. No. 2487, May 27, 1941, 55 Stat. 1647.

[46] The legislative history of that statute (Act of June 21, 1941, 55 Stat. 252) is the last external indication of congressional intent relating to the statute, since the provision's reenactment as Section 215 of the Immigration and Nationality Act of 1952 (Act of June 27, 1952, 66 Stat. 190), while extending its terms to embrace any proclaimed emergency, occasioned no significant comment. See note 53, *infra*, p. 52.

tinent Senate Report stated (S. Rept. No. 444, h Cong., 1st Sess., pp. 1-2):

> * * * Since the outbreak of the present war it has come to the attention of the Department of State and of other executive departments that there are many persons in and outside of the United States who are directly engaged in espionage and subversive activities in the interests of foreign governments, and others who are engaged in activities inimical to the best interests of the United States, who desire to travel from time to time between the United States and foreign countries in connection with their activities, as well as others who desire to leave the United States for the purpose of evading justice.
>
> During the last war, when it is believed a lesser number of persons were engaged in espionage and subversive activities in the United States than is now the case, notwithstanding the fact that the United States is not at war, it was found desirable to enact legislation to provide for the regulation of travel to and from the United States on the part of all persons, citizens as well as aliens. The situation existing throughout the world and the necessity of promoting as far as possible the national defense justify, it is believed, the enactment of legislation providing for the centralization of control over the entry into and departure from the United States of persons of all classes. * * * Since the Act of May 22, 1918, was the subject of considerable litigation and consequently has been construed in a number of respects by the courts of the United States, it seems particularly desir-

able that that act be amended rather than that new legislation be enacted. * * *[46a]

Again, the debates were unequivocal concerning the purpose of the bill, and the intended manner of its operation.[47]

Presidential invocation[48] of this statutory authority, and implementation by the Secretary of State,[49] fol-

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[46a] For the court decisions referred to, see note 55, *infra*, pp. 54–55.

[47] The following remarks are typical:

> Mr. BLOOM. * * * This would prevent a person, like Fritz Kuhn, or anybody else, from leaving the country if we wanted to keep him here. * * * [87 Cong. Rec. 5049].
>
> * * * * * *
>
> Mr. LUTHER A. JOHNSON. * * * The sole purpose of this legislation is to give that same power that this Government had during the World War, and have a sort of clearing house where people entering or leaving this country would have to give their reasons why they were going or coming, and where it would be determined whether they are engaged in espionage, and whether their coming in or going out would be inimical to the interests of the United States. * * * [They] would have to go to the State Department and state why they were coming in or going out and secure an entrance or exit permit. [87 Cong. Rec. 5052.]

See also 87 Cong. Rec. 5048–5053, 5386–5388.

[48] Proc. No. 2523, November 14, 1941, 55 Stat. 1696. See *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206 at 210, note 7; *Kwong Hai Chew* v. *Colding*, 344 U. S. 590, 599–600; *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 540–541.

[49] Departmental Order No. 1003, 6 F. R. 6069. See cases cited in note 55, *infra*, pp. 54–55. These regulations, as amended by Departmental Regulation No. 11, August 27, 1945, 10 F. R. 11046, are still in effect as Part 53 of Title 22 of the Code of Federal Regulations. See App., *infra*, pp. 110–112. They were expressly ratified and confirmed in Presidential Proclamation No. 2850, August 17, 1949, 63 Stat. 1289, amending the alien provisions of the 1941 proclamation, and were incorporated by reference in Proclamation No. 3004, January 17, 1953, 67 Stat. C31 (see *infra*, p. 37).

lowed shortly.[50] Despite the termination of the emergency proclaimed in 1941 on April 28, 1952,[51] Congress continued the statutory provisions in effect until April 1, 1953.[52] *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206 at 210, note 7. Meanwhile, Congress repealed the 1918 statute as amended in 1941 (66 Stat. 279) and reenacted it as Section 215 of the Immigration and Nationality Act of 1952, amending it only so as to make its provisions subject to invocation during "any national emergency proclaimed by the President * * *" (66 Stat. 190).[53]

This is the statute which is in force today. Considered in the light of the long and unequivocal history just outlined, this provision must be read as a delegation to the Secretary of State of authority to continue to exercise his discretionary passport powers so as to prevent, where necessary or appropriate, the

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[50] The history of the operations of the Passport Office during World War II is set forth in Stuart, *Safeguarding the State Through Passport Control*, 12 Dept. of State Bull. (1945) 1066.

[51] Proc. No. 2974, 66 Stat. C31.

[52] 66 Stat. 54, 57, 96, 137, 330, 333. It was during this extension period that the Secretary issued Departmental Regulation No. 108.162, effective August 28, 1952, 17 F. R. 8013, containing the regulations here complained of (22 CFR, 1956 Supp., 51.135–51.143; App., *infra*, pp. 112–116). Petitioners ignore these statutory extensions in arguing that at that time "there was no statute forbidding the departure of citizens without a passport" (Pet. Br. 30–31). This contention is, in any event, irrelevant; see *supra*, pp. 40–42.

[53] The House Report comments only that the statutory provisions "are incorporated in the bill (sec. 215) in practically the same form as they now appear in the act of May 22, 1918 (40 Stat. 559)." H. Rept. No. 1365, 82d Cong., 2d Sess., p. 53.

departure or entry of individual citizens by denying them the passports necessary to such travel. If the purpose of Congress is to be honored, the fact that the statutory restraints evoke some constitutional considerations cannot justify a reading which would nullify the traditional power of the Secretary to deny passports (in cases where the discretionary denial is based upon grounds related to the national security) and wholly frustrate the proclaimed objective of the travel control statute.

2. *Statutory terms:* Putting this significant legislative history to one side, the meaning and purpose of the travel control statute seem clear upon its face. As amended and now in force, the statute, as codified in Title 8 of the United States Code, provides as follows (in pertinent part): [54]

> § 1185. *Travel control of citizens and aliens during war or national emergency—*
> *(a) Restrictions and prohibitions on aliens.*
>
> When the United States is at war or during the existence of any national emergency proclaimed by the President, * * * and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise

[54] This provision is Section 215 of the Immigration and Nationality Act of 1952.

ordered by the President or the Congress, be unlawful—

(1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;

(2) * * *

(3) for any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

* * * * * *

(*b*) *Citizens.*

After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

After presidential invocation of these sections, it is unlawful for *aliens* to depart from or enter the United States except as provided by the President; subsection (a) (3) contemplates the issuance or non-issuance of departure and entry permits to aliens as the means of effectuating these controls.[55] As to a *citizen,* the

[55] Subsections (4)–(7) also relate to such permits. The provisions relating to aliens, which were continued in force in

statute similarly makes it unlawful to depart from or enter the United States, except as provided by the President; and in this case the statute adds *"unless he bears a valid passport"*. Thus, passports are specifically designated as the departure and entry "permits" for citizens.[55a] In short, the intended control of departure and entry[56] was to be carried out by the

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most respects after the end of World War I by the Act of March 2, 1921, 41 Stat. 1217, have been interpreted and applied in the following cases, of which those decided under the statute as amended in 1941 to apply to the then-existing emergency (55 Stat. 252; see *supra*, p. 49) are indicated: *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206 (1941 amendment); *Kwong Hai Chew* v. *Colding*, 344 U. S. 590 (1941 amendment); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537 (1941 amendment); *United States ex rel. Vajta* v. *Watkins*, 179 F. 2d 137 (C. A. 2) (1941 amendment); *Eisler* v. *United States*, 176 F. 2d 21 (C. A. D. C.), certiorari denied, 337 U. S. 958 (1941 amendment); *United States ex rel. Costea* v. *Smith*, 46 F. 2d 229 (C. A. 7); *United States ex rel. Komlos* v. *Trudell*, 35 F. 2d 281 (C. A. 2), certiorari denied, 280 U. S. 607; *McCandless* v. *United States ex rel. Swystun*, 33 F. 2d 882 (C. A. 3), affirming 24 F. 2d 211 (E. D. Pa.); *Felich* v. *Meier*, 23 F. 2d 185 (C. A. 8); *United States ex rel. London* v. *Phelps*, 22 F. 2d 288 (C. A. 2), certiorari denied, 276 U. S. 630; *United States* v. *Karnuth*, 30 F. 2d 242 (C. A. 2), certiorari denied, 279 U. S. 850; *Johnson* v. *Keating ex rel. Tarantino*, 17 F. 2d 50 (C. A. 1); *Flora* v. *Rustad*, 8 F. 2d 335 (C. A. 8); *Throumoulopoloy* v. *United States*, 3 F. 2d 803 (C. A. 1); *Takeyo Koyama* v. *Burnett*, 8 F. 2d 940 (C. A. 9); *Sichofsky* v. *United States*, 277 Fed. 762 (C. A. 9); *Van Lacken* v. *Wixon*, 84 F. Supp. 958 (N. D. Cal.) (1941 amendment); *Ex Parte Van Lacken*, 81 F. Supp. 79 (N. D. Cal.) (1941 amendment); *United States* v. *Goldstein*, 30 F. Supp. 751 (E. D. N. Y.); *Bennedsen* v. *Nelson*, 2 F. 2d 296 (D. Minn.); *In re Wysbak*, 292 Fed. 761 (D. Mass.).

[55a] See *supra*, p. 46.

[56] The 1918 statute (40 Stat. 559) was entitled "An Act To prevent in time of war *departure from or entry into* the United States *contrary to the public safety*" (emphasis added).

denial of permits to individual aliens, and by the denial of passports to individual citizens, where the departure or entry of such persons was deemed "contrary to the public safety" in the context of the war or emergency which required the invocation of the restrictions. And with respect to citizens, this meaning becomes even clearer because Congress deliberately chose to employ the mechanism of the passport which carried with it over a century of clear administrative discretion.

Any other reading of the statute renders the provision as to travel control of citizens meaningless. If the Act does not confirm the authority of the Secretary of State to refuse to issue passports to certain applicants, as Judge Bazelon's opinion suggests (R. 211–212),[57] it does not authorize control of the depar-

[57] Judge Bazelon reads the statute as granting "the Secretary discretion * * * to determine which parts of the world can be visited by Americans only if they have passports, *but not to determine which Americans are to receive passports*" (R. 210; emphasis added). In other words, every citizen who applies must be issued a passport, thereby making it lawful for him to "depart from or enter * * * the United States"; the only discretion vested in the Secretary, he says, is to restrict the passport against use in certain "parts of the world". But this restriction would carry no sanctions, since the statute makes it unlawful only to "depart from or enter" the country *without a lawful passport*. Under Judge Bazelon's theory, the only way in which the Secretary could effectuate the stated statutory purpose of "prevent[ing] in time of war *departure from or entry into* the United States contrary to the public safety" would be to lay a blanket prohibition upon travel to *any* area of the world without a passport, directed at all citizens alike. But, as we have just seen, there would be no enforcement power to back up such a prohibition if the Secretary is under a

ture and entry of citizens at all. While the citizen intended to be restricted by the statute could not travel abroad without a passport, this disability could be cured by the mere formality of submitting a passport application which the Secretary would be powerless to deny. Since the method of individual control which has been put in force by the Secretary was plainly intended by Congress, and since the statutory language may only be read intelligently as providing such individual control through passport denials, the courts may not ignore this plain meaning of the statute merely to avoid a decision as to its validity. *Jay* v. *Boyd*, 351 U. S. 345, 357, note 21; *United States* v. *Sullivan*, 332 U. S. 689, 693; *Hopkins Federal Savings & Loan Assn.* v. *Cleary*, 296 U. S. 315, 334–335. The courts "must also avoid a construction that would seriously impair the effectiveness of the Act in coping with the problem it was designed to alleviate". *United States* v. *Harriss*, 347 U. S. 612, 623.

C. THE STATUTORY TRAVEL RESTRICTIONS ARE NOW IN EFFECT

On December 16, 1950, President Truman, finding that "world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world," proclaimed the existence of the

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ministerial duty to issue passports to all citizen applicants. Cf. Judge Fahy, dissenting, in No. 621, at R. 301. The legislative history (*supra*, pp. 45–53) shows clearly that the President was to exercise two functions: (1) to determine what citizens would be issued passports, and (2) to determine what areas could be visited without a passport (*e. g.*, Canada). See, *e. g.*, 56 Cong. Rec. 6030.

national emergency which is in effect today.[58] This existing state of emergency, together with Section 215 of the Immigration and Nationality Act (8 U. S. C. 1185), was cited as authority for the Presidential Proclamation reinvoking the statutory travel control provisions on January 17, 1953, following the 1952 reenactment of the travel control statute[59] (see *supra*,

[58] Proc. No. 2914, 64 Stat. A454. The pertinent portions of that Proclamation are as follows:

> WHEREAS recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and
>
> WHEREAS world conquest by Communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and
>
> WHEREAS if the goal of Communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; and
>
> WHEREAS the increasing menace of the forces of Communist aggression requires that the national defense of the United States be strengthened as speedily as possible:
>
> NOW, THEREFORE, I, HARRY S TRUMAN, President of the United States of America, do proclaim the existence of a national emergency * * *.
>
> * * * * * *

[59] Proc. No. 3004, 67 Stat. C31, "Control of Persons Leaving or Entering the United States by the President of the United States of America"; see App., *infra*, pp. 105–108. This Proclamation revoked the then-existing Proclamation No. 2523 of

p. 52). The Proclamation stated that "the exigencies of the international situation and of the national defense still require" that the statutory restrictions upon departure and entry be continued in "the interests of the United States * * *" (App., *infra*, p. 106). The regulations of the Secretary relating to departure and entry which had been issued in 1941[60] were expressly incorporated, as amended, in the Proclamation (Paragraph 1, App., *infra*, p. 107).[61]

November 14, 1941, as amended (see *supra*, note 48, p. 51), under which travel controls had been in force up to that time. It is apparent that one of the chief purposes in issuing the new proclamation, substantially continuing the provisions of the one it superseded, was to dispel any possibility that the reenactment of the statutory provisions under which it had been issued might be construed as voiding the prior proclamation. Thus, Proclamation No. 3004 was issued to take effect *nunc pro tunc* as of December 24, 1952, the date on which the Immigration and Nationality Act provision superseded the provision enacted in 1918 and amended in 1941 (see 66 Stat. 281). The terms of Proclamation No. 3004 made it unnecessary to reissue the prior regulations, however (see text, this page).

[60] 22 C. F. R. 53.1–53.9, App., *infra*, pp. 110–112; see *supra*, note 49, p. 51.

[61] The Proclamation further provided that "the provisions of this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, shall be in addition to, and shall not be held to revoke, supersede, modify, amend, or suspend, any other proclamation, rule, regulation, or order heretofore issued relating to the departure of persons from, or their entry into, the United States * * *" (Paragraph 4, App., *infra*, pp. 107–108). Thus if the then-existing provisions of Sections 51.135–51.143 of the Passport Regulations are considered as regulations "relating to the departure of persons from, or their entry into, the United States," rather than merely as regulations relating to the issuance of passports, they are confirmed by the Proclamation.

D. THE REGULATIONS DENYING PASSPORTS ON GROUNDS OF COMMUNIST PARTY MEMBERSHIP OR ACTIVITY ARE WITHIN THE SECRETARY'S STATUTORY AUTHORITY UNDER THE TRAVEL-CONTROL STATUTE

The regulation in question, Section 51.135 (App., *infra*, pp. 112–113), is expressly designed to "promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement * * *." This aim is clearly within the limitations of the statutory delegation: the control of travel on grounds related to the national defense, the national safety, and foreign policy.

When the Secretary of State promulgated the regulation, he acted on the basis of a number of considerations. We print in Appendix B to this brief (*infra*, pp. 117*ff*) the summary of these considerations, and of the State Department's passport practices in relation to Communists, set forth in the *Report of the Commission on Government Security* (1957).

1. The first of these considerations was the history of past Communist abuse of United States passports. As the Commission notes (App., *infra*, p. 113), "ever since the end of World War I, American Communists and alien Communists illegally in possession of American passports had effectively carried on abroad espionage, propaganda and revolutionary activities on behalf of the Soviet Government and the international Communist movement and contrary to the foreign policy of the United States Government".[62] For

[62] As early as 1920, the Department of State adopted regulations providing for the denial of passports to "revolutionary

example, prior to World War II an espionage agent was arrested in Copenhagen and was found to have four United States passports in his possession.[63] In Moscow, Berlin, Canada, and the United States, the Communist underground maintained so-called "Pass-Apparats" devoted to the wholesale forgery and falsification of passports and other documents. Dallin, *Soviet Espionage* (1955), 92–103, 285–287. In the Berlin "Pass-Zentrale" and its European branches, 170 specialists in falsifying passports (known as "cobblers" through the Communist underground) were kept busy. One technique of their trade has been described as follows (*id.* at 100):

> The agents in the provinces and abroad who endeavored to obtain genuine passports from sympathizers (but, for obvious reasons, not members of the Communist parties) or through "front" organizations were sometimes very successful. To serve the party, sympathizers would apply for passports and then turn them over to the apparat. At times the supply of "genuine" passports obtained by this method was considerable. * * *

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radicals". We have printed portions of the 1920, 1921, and 1937 regulations, and of the Foreign Service Regulations in force since 1948, in Appendix C at pp. 125–129. We have also printed portions of a Memorandum from the Under Secretary of State which preceded the initial promulgation of these regulations (App. C, *infra*, pp. 123–125).

[63] *Hearings Before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, United States Senate, on Scope of Soviet Activity in the United States*, Part 23, 84th Cong., 2d Sess., pp. 1215–1216 ("Senate Hearings" hereafter).

During the Spanish Civil War, several thousand Americans fraudulently obtained passports to join the International Brigade. The bulk of the passports eventually found their way to Moscow for alteration and possible use by Soviet agents (App. B, *infra*, p. 120).[64] This wholesale conversion of passports to Communist purposes naturally constituted a major threat to the currency, prestige, and efficacy of bona fide United States passports, and thus a threat to the travel of their bearers.[65]

The State and Justice Departments' investigations of such activities culminated in the conviction of Earl

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[64] See also Dallin, *op. cit. supra*, at p. 102.

Walter G. Krivitsky, former Chief of Soviet Intelligence in Europe, has described this process as follows:

> All the volunteers' passports were taken up when they arrived in Spain, and very rarely was a passport returned. Even when a man was discharged he was told that his passport had been lost. From this action alone about 200 volunteers came over, and genuine American passports were highly prized at OGPU headquarters in Moscow. Nearly every diplomatic pouch from Spain that arrived at the Lubianka contained a package of passports from members of the International Brigade.
>
> Several times while I was in Moscow in the Spring of 1937, I saw this mail in the offices of the foreign division at OGPU. One day a package of about 100 passports arrived; half of them were American. They had belonged to dead soldiers. That was a great haul, a cause for celebration. The passports of the dead, after some weeks of inquiry into the family histories of their original owners, were easily adapted to their new bearers, the OGPU agents.

Krivitsky, *In Stalin's Secret Service* (1939), p. 95.

[65] See *Dallin*, *op. cit. supra*, at 97 for the effect of Communist forgery of Czech passports on those documents. And compare *For. Rel.* 1916, Supp., 3, 8, concerning the effect of the fraudulent use of American passports by Germans in World War I.

Browder, then general secretary of the Communist Party of the United States of America, and Welwel Warszower, the Party's financial secretary,[66] for unlawful use of passports, their convictions being affirmed by this Court.[67] *Browder* v. *United States*, 312 U. S. 335; *Warszower* v. *United States*, 312 U. S. 342.

In the postwar period, various types of passport frauds have been practiced by persons associated with the Communist movement. The most common of these is perpetrated by individuals wishing to circumvent the restrictions against the use of passports for travel to certain countries behind the Iron Curtain.[68] Instead of challenging the validity of such restrictions in the courts, as have petitioners here, certain persons have falsified their destinations or the purposes of their proposed travel in their applications, and then have used the passports thus obtained to leave the United States for destinations for which

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[66] Senate Hearings, Part 23, p. 1213.

[67] Browder was found to have obtained passports under different assumed names by means of false statements in 1921, 1927, and 1931 (312 U. S. at 336); Warszower, an alien, had obtained his passport by false statements with respect to his name, citizenship, place of birth, and residence abroad, including the use of a certified copy of a forged entry in the Atlantic City birth records (*id.* at 347). The indictment of other violators was barred by the three-year statute of limitations then in force for passport fraud. See Senate Hearings, Part 23, p. 1214.

[68] Use of a passport in violation of its restrictions is a crime (18 U. S. C. 1544), but one who travels to a country for which the passport is not valid does not commit a crime unless he "uses" the passport in the process. See Senate Hearings, Part 23, pp. 1231–1232.

passports would not have been issued had the Department of State been apprised of the true facts.[69]

This, then, was the history of Communist abuse of passports which was one of the factors considered by the State Department in 1950 in adopting a firm policy of denying passports to all Communists[70] (App. B, *infra*, pp. 119–120). That this history lends firm support to that policy is beyond challenge. The record of abuse clearly justified refusal to give passports to Communists when passports were merely "political documents". That record continues to be a valid factor today. For when the passport became an instrument of travel control, it did not lose its characteristics as a "political document" (*Communist Party of the United States* v. *Subversive Activities Control Board*, 223 F. 2d 531, 555, 556 (C. A. D. C.), reversed on

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[69] See *Report of the Commission on Government Security*, pp. 470–475, App. B, *infra*, p. 117*ff*; Senate Hearings, Part 23, pp. 1229–1232; S. Rept. No. 131, 85th Cong., 1st Sess., pp. 214–216 (1957); *Hearing Before the Committee on Un-American Activities of the House of Representatives, Investigation of the Unauthorized Use of United States Passports*, 84th Cong., 2d Sess., passim, especially Part 1, pp. 4321–4343.

[70] Prior to that time some Communists, but not all, were denied passports. President Truman in his message vetoing the Internal Security Act of 1950 (see *infra*, pp. 67–69, 73–75), stated (96 Cong. Rec. 15631):

> It is claimed that this bill would deny passports to Communists. The fact is that the Government can and does deny passports to Communists under existing law.

The Minority Views of the Senate committee reporting that bill also noted that "the Secretary of State has denied passports to Communists and others in the interests of national security", citing 22 U. S. C. 211a. S. Rept. 2369, Part 2, 81st Cong., 2d Sess., pp. 3, 10. See also, to the same effect, 96 Cong. Rec. 13755–13756, 14538, 14599–14600.

other grounds, 351 U. S. 115; *Shachtman* v. *Dulles*, 225 F. 2d 938, 940 (C. A. D. C.)), desirable as such for Communist purposes.[71] Moreover, that the organized use of United States passports for Soviet espionage purposes continues today is attested by a former officer of the intelligence branch of the MVD who defected to the West in Tokyo in January 1954:

> Mr. RASTVOROV. The Military Intelligence Service and Political Intelligence Service, MVD, have special sections, so-called section of illegal intelligence work abroad. In other words, these sections, GRU and MVD, engage in training their own intelligence personnel in order later, after sending many illegally to foreign countries, and particularly in United States and Great Britain, and for these purposes they are very interested in getting documents in foreign countries, in other words, all kinds of official documents, and especially passports, diplomatic, business passports and so on and so on.
>
> They are really interested in this and doing their best to get these passports in order to forge them and send people, they call here sleepers to these countries, and particularly in

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[71] See *Communist Party of the United States* v. *Subversive Activities Control Board*, *supra*:

> * * * Only rudimentary reasoning is necessary to a conclusion that the Government may validly decline to confer its diplomatic protection upon, and to request foreign governments to give aid and protection to, a member of an organization operating primarily to achieve the objectives of a world movement such as the Communist movement is defined to be in the statute. Surely a government owes no duty of protection to those who, dominated by a foreign organization, seek its overthrow. * * *

United States. The United States, at the present time, is the main object for these purposes.

Mr. MORRIS. Getting hold of of the American passports?

Mr. RASTVOROV. Yes.

Mr. MORRIS. It is considered to be a very desirable thing for Soviet intelligence purposes?

Mr. RASTVOROV. Yes, very.

Senator BUTLER. Have you ever seen any evidence of an attempt to counterfeit our passports?

Mr. RASTVOROV. Yes, I know people who work in that section who engage in this.

Senator BUTLER. And they get a good passport and from that as a guide they counterfeit others, is that it?

Mr. RASTVOROV. Yes.

Senator WELKER. Mr. Rastvorov, do you think it is advisable for Communists here in the United States to seek and obtain passports and travel abroad, go overseas?

* * * * *

Mr. RASTVOROV. Yes, it is a very good idea for Communist purposes.

Senator WELKER. How is it with respect to our Government's purposes, the United States?

Mr. RASTVOROV. It is very undesirable for United States Government to permit people, especially Communists or so-called pro-Soviet type, to travel in foreign countries, especially in Soviet Union and in Eastern Europe with these passports, because it is very dangerous, as I mentioned before.

Mr. MORRIS. Do you know what they do with these passports?

Mr. RASTVOROV. Yes, they use it for intelligence purposes.[72]

2. Another factor relied upon by the Secretary of State as supporting the denial of passports to Communist Party members, while the travel control statute is in force, was the history of judicial and legislative findings on the nature and purposes of the world Communist movement, which indicate the purposes for which Communists may well use the right to travel abroad (App. B, *infra*, p. 119). In *Dennis* v. *United States*, 341 U. S. 494, 516–517, the Court found that the defendants' "conspiracy to organize the Communist Party and to teach and advocate the overthrow of the Government of the United States by force and violence created a 'clear and present danger' of an attempt to overthrow the Government by force and violence." See also, *e. g.*, *American Communications Association* v. *Douds*, 339 U. S. 382; *Gerende* v. *Election Board*, 341 U. S. 56; *Garner* v. *Los Angeles Board*, 341 U. S. 716;

[72] Senate Hearings, Part 1, p. 21. At the trial of Col. Rudolf Abel of Soviet intelligence, who was convicted of conspiracy to transmit United States defense and atomic secrets to the Soviet Union and conspiracy to commit espionage (*New York Times*, October 26, 1957, p. 1, col. 4), Lt. Col. Reino Hayhanen, a former subordinate of Col. Abel who defected in May 1957, testified that in 1952 he had entered the United States to do espionage work using a United States passport issued in the name of "Maki" (*New York Times*, October 15, 1957, p. 10, col. 3). The Government submitted in evidence a passport application filed by Hayhanen indicating that he had obtained a United States passport in Helsinki on July 3, 1954, in the name of Eugene Nicolai Maki, a supposed United States citizen (*New York Times*, October 18, 1957, p. 2, cols. 3–4). See also *Washington Post and Times Herald*, February 13, 1958, p. C14, col. 3.

Adler v. *Board of Education*, 342 U. S. 485; *Carlson* v. *Landon*, 342 U. S. 524; *Harisiades* v. *Shaughnessy*, 342 U. S. 580; *Galvan* v. *Press*, 347 U. S. 522. In addition, Congress had made a finding in the Internal Security Act of 1950[73] that the "Communist movement * * * is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship * * *." See *Galvan* v. *Press*, 347 U. S. 522, 529. Of singular importance was a companion finding giving clear expression to a congressional intent that the travel of active Communists be restricted (64 Stat. 987–988; emphasis added):

> As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress finds that—
>
> * * * * *
>
> (8) Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, *travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement.*[74]

[73] Section 2 (1), 64 Stat. 987, 50 U. S. C. 781 (1).

[74] Other findings included the following (64 Stat. 988–989):

> (9) In the United States those individuals who knowingly and willfully participate in the world Communist movement, when they so participate, in effect repudiate

In view of this finding and the existing statutory provisions authorizing the Secretary to control travel, the Secretary could not properly have ignored the dangers of issuing passports which would facilitate the travel of Communists and Communist adherents. Cf. *Hintopolos* v. *Shaughnessy*, 353 U. S. 72, 78–79; *Kwong Hai Chew* v. *Colding*, 344 U. S. 590, 600.[75]

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their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement.

* * * * * * *

(15) * * * The Communist organization in the United States * * * present[s] a clear and present danger to the security of the United States and to the existence of free American institutions * * *.

See *Carlson* v. *Landon*, 342 U. S. 524, 535, note 21. The finding as to renunciation of allegiance is particularly significant in view of the fact that allegiance is the touchstone of eligibility to apply for passports (22 U. S. C. 212; App. A, *infra*, p. 109).

[75] Moreover, we question whether the Secretary should be required to issue passports to adherents of the Communist movement when such issuance will enable them to travel to foreign countries and engage in conduct leading to their calling upon this Government for its protection. As Judge Prettyman has noted below (R. 182–183):

A statute [15 Stat. 224 (1868), 8 U. S. C. (1946 ed.) 903b (now 22 U. S. C. A. 1732 (Supp. 1957)] alluded to by the Supreme Court in *Johnson* v. *Eisentrager* [339 U. S. 763, 770], provides that, whenever the President learns that a citizen of the United States has been deprived of his liberty by any foreign government, he must demand the reasons and, if it appears the imprisonment is wrongful, demand release and use such means not amounting to war as are necessary to effectuate the release. So, while a passport as such does not bestow rights of protection which a citizen does not otherwise have, it does, as a permit to travel abroad, allow him to put himself in a position where he may invoke the protective power of this government. So

3. The policy expressed in the regulation of the Secretary not only finds support in prior actions of this Court and of Congress, but it has found subsequent endorsement in both official and unofficial quarters. While considerable criticism has been directed at certain aspects of the implementation and administration of this policy,[76] seldom have thoughtful and informed observers recommended abandonment of the policy itself. Thus, the Commission on Government Security, while recommending a number of administrative and other changes, did so in the context of the following basic finding of necessity (*Report*, 470; App. B, *infra*, p. 117):

> A passport security program is necessary to deter travel abroad by subversives bent on missions detrimental to the United States and to narrow as much as possible the sphere of Soviet international conspiratorial activity in the fields of espionage and propaganda.

One of the most acute critics of the State Department's passport program, Professor Louis L. Jaffe of the Harvard Law School, has stated:

> one of the questions here is whether the Secretary may prevent an American with Communist affiliations from being in a place where political indiscretion might involve the United States Government in international complications.

[76] In this connection, we think it unnecessary to comment upon petitioners' recitation of "horrible examples" (Pet. Br. 43–44). As this Court observed in *Yakus* v. *United States*, 321 U. S. 414, 434, "For the purposes of this case, * * * it is irrelevant to suggest that the Administrator or the Court has in the past or may in the future deny due process. Action taken by them is reviewable in this Court and if contrary to due process will be corrected here. Hence we have no occasion to pass upon determinations * * *, said to violate due process, which have never been brought here for review * * *."

In the Civil War and again in World War I, the United States set up a rigid system of passport control. The criterion here is the defense of the country from external enemies. It is asserted that the precedents of "war" have no relevance to "peace." But the critical consideration is defense against an external enemy; and communication abroad between our citizens and the enemy cannot by its nature be controlled by the usual criminal process. The facts in a particular case as to the citizen's intention are inevitably speculative: all is to be done after the bird has flown. Now our Congress and the Administration have concluded that the Communist International is a foreign and domestic enemy. We deal with its domestic aspect by criminal process; we would seem justified in dealing with its external aspect by exit control. If an avowed Communist is going abroad, it may be assumed that he will take counsel there with his fellows, will arrange for the steady and dependable flow of cash and information, and do his bit to promote the purposes of the "conspiracy."

* * * * *

* * * despite the heavy risks of maladministration, the United States is, in my opinion, justified in denying passports to persons whose journey abroad is presumptively in furtherance of the Communist "conspiracy." If such a policy is not clearly required, it is, I think, within the range of reasoned choice and not violative of fundamental principle. * * *

Jaffe, *The Right to Travel: The Passport Problem,* 35 Foreign Affairs 17, 26–27 (Oct. 1956). See also Note, 41 Geo. L. J., *op. cit., supra,* pp. 63, 89–90; Note,

"Passport Denied": State Department Practice and Due Process, 3 Stanford L. Rev. 312, 322 (1950–1951).

In the present state of the world, it cannot be said that the dangers of Communist misuse of the "right to travel" are so minimal or so speculative that the Secretary is barred from concluding that such foreign travel by Communists would be contrary to the national security and the national safety in today's era.

4. Petitioners suggest that travel controls are not a justifiable means of combatting the Communist threat because of "the availability of alternative means of communication * * *" (Pet. Br. 45–46). But Congress has found in the Internal Security Act of 1950 that "travel * * * from country to country * * * is a *prerequisite* for the carrying on of activities to further the purposes of the Communist movement" (*supra,* p. 68). The hard fact is that, despite the availability of "alternative means," the Communist movement itself considers travel—and passports—to be of basic importance to its activities (see *supra,* pp. 60–67). It may be that, despite what we have said, limitations upon the travel of Communist adherents are not absolutely indispensable to combat the threat to this country of the international Communist movement. "But because it is not indispensable does not mean that it is not desirable or permissible." *United Public Workers* v. *Mitchell;* 330 U. S. 75, 100. Petitioners, significantly, do not contend that world conditions fail to justify a state of emergency or the invocation of statutory travel controls. Like petitioners, we do not believe that the courts will overrule the collective judgment of the political branches that the

Communist movement has not yet ceased to be the serious internal and external threat which the Court has held it to be. Cf. *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 590; *Ludecke* v. *Watkins*, 335 U. S. 160, 167–170.

5. Petitioners also make the curious assertion that the Secretary's refusal to issue passports to Communists, far from effectuating the congressional intent, is directly contrary to that intent as revealed by reading the travel-control statute together with the Internal Security Act of 1950 (Pet. Br. 33–36). The argument is that Congress, by the Internal Security Act, intended to narrow the Secretary's traditional discretion, because Section 6 of that Act[77] makes it unlawful for a member of a registered Communist organization[78] to apply for or use a passport, and for any officer or employee of the United States knowingly to issue a passport to such a member; penalties of up to $10,000 fine and five years' imprisonment for violation are provided. Petitioners argue in effect—without pointing to anything in the statute or its legislative history to support the argument—that this provision occupies the field and nullifies all other statutes or regulations relating to the issuance of passports. But the fact is that Section 6 and the Secretary's regulations serve two different purposes and involve no conflict. Section 51.135 of the regulations (App. A, *infra*, pp. 112–113) establishes cate-

[77] 64 Stat. 993, 50 U. S. C. 785; *infra*, p. 104.

[78] *I. e.*, registered under the procedures of the Internal Security Act of 1950.

gories of persons to whom passports will be denied in the exercise of administrative discretion; Section 6, on the other hand, defines a more limited category of persons who may not even *apply for or use* a passport without being guilty of a felony, and additionally imposes criminal penalties upon officers of the Department of State who knowingly issue passports to such persons. That this penal statute has not yet become operative cannot, on the basis of some clairvoyant insight into "congressional will", preclude the Secretary, in his discretion, from continuing to deny passports to the categories of persons specified in Section 51.135.

Indeed, as already indicated, everything in both the travel-control statute and the Internal Security Act, and their histories, contradicts petitioners' reading of the congressional purpose. Congress knew when the latter statute was enacted that the Secretary was then denying passports to certain Communists in his discretion,[79] yet it gave no indication that it intended that this policy be reversed until such time as a Communist organization became finally registered after proceedings before the Subversive Activities Control Board under the Internal Security Act. Moreover, the travel-control statute was reenacted in 1952, two years after the passage of the Internal Security Act, with a change permitting its invocation during the then-existing emergency (see *supra*, p. 52). This 1952 reenactment gave no indication that the controls it authorized could not be applied to supporters of the very threat against which

[79] See note 70, *supra*, p. 64.

the emergency which was the pre-condition of those controls was directed. Cf. *United States ex rel. Kwong Hai Chew* v. *Colding*, 192 F. 2d 1009, 1011 (C. A. 2), reversed on other grounds, 344 U. S. 590. Petitioners' contention does not make sense.[80]

E. THE SECRETARY MAY REQUIRE INFORMATION AS TO PRESENT OR NEAR-PAST MEMBERSHIP IN THE COMMUNIST PARTY

1. *If present Party membership is sufficient for denial of an application*—Clearly, if the Secretary may refuse a passport to a member of the Communist Party—as we argue above, *supra*, pp. 60–75—he may require a passport-applicant to submit an affidavit with respect to present or near-past membership. The statutes and regulations make such a requirement, and it is an appropriate method of aiding the Secretary to perform his functions.

[80] Petitioners also contend (Pet. Br. 36–37) that the Secretary's regulations conflict with the Expatriation Act of 1868, 15 Stat. 223–224, R. S. 1999 (printed at Pet. Br. 61), because the regulations "necessarily prevent expatriation", which "is not possible without freedom to depart from one's country" (Pet. Br. 37). If petitioners wish to expatriate themselves—and this was not among the stated purposes for which they desired the passports here in issue—they may do so by journeying to any country in the Western Hemisphere, without passports (see 22 CFR 53.2; App. A, *infra*, p. 111), and performing any one of the acts resulting in loss of nationality listed in 8 U. S. C. 1481. In any event, the thrust of this argument goes, not to the Secretary's regulations, but to the statute, 8 U. S. C. 1185 (see Judge Bazelon's dissent at R. 212-213). And the terms of the 1868 Expatriation Act are aimed solely at "any declaration, instruction, opinion, order, or decision of any officers of this government", not at subsequent congressional legislation. If petitioners' reading of the Expatriation Act is correct, it would appear to invalidate all our subsequent laws restricting immigration.

(*a*). Section 1 of Title IX (Passports) of the Act of June 15, 1917; c. 30, 40 Stat. 217, 227, 22 U. S. C. 213, provides as follows (emphasis added):

> Before a passport is issued to any person by or under authority of the United States such person shall subscribe to and submit a written application duly verified by his oath before a person authorized and empowered to administer oaths, *which said application shall contain a true recital of each and every matter of fact which may be required by law or by any rules authorized by law* to be stated as a *prerequisite* to the issuance of any such passport.[81]

The regulations issued by the President[82] prescribe in detail the procedures which must be complied with by all passport applicants, including the manner of execution of the application (22 CFR 51.51–51.73), its contents (22 CFR 51.14), and the necessary supporting documents which must accompany applications (22 CFR 51.23–51.26). The Presidential regulations further provide as follows (22 CFR 51.74):

> *Affidavits.* Any affidavit which may be required under the rules in this part or shall be submitted in support of an application for a passport or the renewal, extension, or amendment of a passport shall be considered as, and become, a part of the application.

As we have seen (*supra*, p. 41), these regulations also include a delegation of rule-making authority to the Secretary of State.

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[81] This provision was reiterated in Executive Order No. 7856 (1938), 3 F. R. 799. See 22 CFR 51.14, App., *infra*, p. 110.

[82] Executive Order No. 7856 (1938), 3 F. R. 799, 22 CFR 51.1, *et seq.*

The regulations of the Secretary, after providing for the denial of passports on grounds of present Communist Party membership or present or potential activity on behalf of the Communist movement,[83] then provide (emphasis added):[84]

> *Oath or affirmation by applicant as to membership in Communist Party.* At any stage of the proceedings in the Passport Division or before the Board, *if it is deemed necessary,* the applicant may be required, *as a part of his application,* to subscribe, under oath or affirmation, to a statement with respect to *present or past membership in the Communist Party.* If the applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings.

Reading the foregoing provisions together: (1) the passport statute prohibits the issuance of a passport to any applicant unless and until he has submitted an application containing "a true recital" of "every matter of fact which may be required by * * * any rules authorized by law";[85] and (2) the Secretary's rules require, "if it is deemed necessary," the submission "as a part of his application" of a statement "with respect to present or past membership in the Communist Party", and provide that any affidavit

[83] 22 CFR, 1956 Supp., 51.135; App. *infra*, pp. 112–113.

[84] 22 CFR, 1956 Supp., 51.142; App. *infra*, p. 115.

[85] The Rules of the Board of Passport Appeals require that "prior to petitioning for an appeal, an applicant shall (a) * * * (b) comply with the provisions of § 51.142 [the affidavit requirement, *supra*], as a part of his application, if deemed necessary by the Passport Office". 22 CFR, 1956 Supp., 51.156; App. A, *infra*, p. 116.

required by the rules "shall be considered as, and become, a part of the application". Thus, if the submission of a sworn statement in the form prescribed by Section 51.142, *supra*, is "deemed necessary," the application is not complete and no passport may issue until such a statement has been submitted.[86]

(*b*) Both petitioners have refused to submit the affidavits "deemed necessary" as a part of the application in their cases, and raise a number of objections to the affidavit requirement.[87] But if, as we

[86] Judge Fahy's dissent (R. 241–246) is based upon the conclusion that passports have in fact been denied in these cases, not by a decisional process but "through the self-executing effect of * * * the Regulations" (R. 246). But Section 51.142 is not in fact self-executing, since it requires a decision as to whether the affidavit is in fact "necessary" in a given case.

[87] At their respective Passport Office hearings during which their final refusals to submit affidavits took place, each petitioner grounded his refusal solely upon the claim that Communist Party membership was irrelevant to entitlement to a passport. No constitutional objections to the affidavit were specifically interposed (R. 34–64, 127–150). The only invocation of the Constitution against the affidavit requirement in either case occurred several months before the hearing in Briehl's case, when his attorney declined a written request for an affidavit, relying upon "the First, Fifth, Ninth and Tenth Amendments" (R. 118). Compare *Ullmann* v. *United States*, 350 U. S. 422, 439, note 15, refusing to consider First Amendment objections not raised when the defendant finally refused to answer a question propounded by a grand jury. It is noteworthy that counsel for the present petitioners were also counsel for Ullman, for the Court there said: "Petitioner did not make any objection to the questions other than the assertion of the unconstitutionality of the Immunity Act. It should also be noted that when petitioner—who, the record shows, was an experienced witness, *had been advised by counsel especially experienced in this field*, and was desirous of making this a test

have shown, Communist Party membership is a valid ground for denial of petitioners' applications, any arguments directed against the affidavit requirement are wholly drained of substance. If Communist Party membership is a basis for decision on the applications, it is manifestly an appropriate subject for inquiry, whether it be in the application itself or in the course of administrative proceedings. *In re Anastaplo,* 3 Ill. 2d 471, 121 N. E. 2d 826, certiorari denied, 348 U. S. 946. It must be equally true that the Department of State may lawfully consider as incomplete and refuse to give further consideration to any application which, after an appropriate request directed to the applicant, fails to include such basic information.

As Judge Prettyman said below (R. 194–195):

> * * * There is nothing new or novel about requiring an applicant for a permit or a license to supply pertinent information under oath. Applicants for radio licenses and air route certificates must do so, and applicants for marriage licenses, voting privileges, and business permits must also. And, failing to supply the required data, the applicant cannot exercise his right. We know of no reason why an application for a passport should not be treated by the usual rules pertaining to applications. * * *

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case—refused to answer the questions propounded before the grand jury the second time, he did not claim any privilege under the First Amendment". *Ibid;* emphasis added. We therefore question whether these objections should now be considered by the Court.

It is also noteworthy that in the present cases the Fifth Amendment has never been invoked, except in the letter of Dr. Briehl's attorney, *supra.* It is not relied upon here.

Judge Washington has added (R. 202–203):

> * * * [Petitioners have] not suggested any reason or rule of law that would require a governmental agency to proceed to hear and determine on its merits the claim of a person seeking to exercise a right or privilege, when the claimant declines to file a complete application, as required by statute or by a regulation having—like the present one—the force of law. * * * I do not see why the decision-maker must act in spite of the fact that he has not received answers to relevant questions which were properly asked, and which may provide information necessary for a proper decision.

See also, *e. g., Pacific Power & Light Co.* v. *Federal Power Comm'n*, 111 F. 2d 1014, 1017 (C. A. 9) ("The Commission properly requires applicants to make a full disclosure of all material facts"); *Middlesboro Liquor & Wine Co.* v. *Berkshire*, 133 F. 2d 39 (C. A. D. C.); *Great Western Broadcasting Ass'n* v. *Federal Communications Comm'n*, 94 F. 2d 244 (C. A. D. C.); cf. *Alton Railroad Co.* v. *United States*, 315 U. S. 15, 25; *Brooks* v. *Laws*, 208 F. 2d 18 (C. A. D. C.); *In re Anastapolo, supra; Cloverleaf Trailer Sales Co.* v. *Borough of Pleasant Hills*, 366 Pa. 116, 76 A. 2d 872; *Cohen* v. *Thompson*, 101 N. J. Law 503, 129 Atl. 700; *Spears* v. *State Bar of California*, 211 Cal. 183, 294 Pac. 697; *Rosencranz* v. *Tidrington*, 193 Ind. 472, 141 N. E. 58, 28 A. L. R.

1136; 53 C. J. S., *Licenses*, Sec. 39, pp. 636–637.[88] Petitioners' present plight is of their own making.

(*c*) Petitioners characterize the inquiry by means of the affidavit as an "unconstitutional test oath" which, due to its search into present and past Communist Party membership, further compounds an asserted imposition of bills of attainder and *ex post facto* punishment. But an analysis of the requirement completely disposes of these charges.

Assuming that an admission of *present* Communist Party membership would lead to automatic denials of the applications under Section 51.142 of the regulations,[89] petitioners could have complied with the requirement of an oath or affirmation in any one of three ways, depending upon the actual facts of their membership or non-membership in the Communist Party:—(1) They could have filed affidavits asserting that they were members of the Communist Party. In such event their applications would have been finally denied without further proceedings. (2) They could have filed affidavits asserting that they were not then and had not been in the past members of the

[88] In *United States* v. *Eisler*, 75 F. Supp. 640 (D. D. C.), affirmed, 176 F. 2d 21 (C. A. D. C.), certiorari denied, 337 U. S. 958, a conviction for giving false statements in an application to the Secretary of State for an alien-departure permit was upheld. In sustaining the materiality of the defendant's Communist Party membership to the application for the permit, the District Court said: "The critical question here is whether or not such information was material to a proper consideration of the application and investigation of the applicant * * * " (75 F. Supp. at 644). Holding that it was, the court ruled that the defendant was required to furnish this information in answer to a question on the application form.

[89] 22 CFR, 1956 Supp., 51.142; App. A, *infra*, p. 115.

Communist Party. In that event, this information would have been considered with and balanced against the contrary information indicated in the letters to petitioners and in the affidavits of the Director of the Passport Office (Miss Knight). (3) They could have filed affidavits stating that they were not then members of the Communist Party but that they had been members in the past,[90] outlining the history of such membership. This information would, as in the case of denial of any membership, have been taken into consideration and weighed along with other material available to the Department of State.

Thus, Section 51.142 (the affidavit requirement) calls for a factual statement concerning membership status, not an avowal of beliefs. It does not prescribe a set form which all applicants must sign on pain of denial of the application; instead, it leaves it to the applicant to fill in its substance according to the facts of his individual case. True, one who is a present member of the Communist Party cannot, under the regulation as written, write and sign a truthful affidavit and still hope to be issued a passport, and hence must either (a) leave the Party before signing the affidavit if he is sufficiently desirous of obtaining a passport; (b) sign and submit a statement that he is not a Communist Party member and thus perjure himself; or (c) abandon his attempts to secure a passport. But this was precisely the case in all of the recent instances in which the Court has upheld the principle that, if a substantive criterion such as membership in the Communist

[90] As to how far in the past, see *Stewart* v. *Dulles*, 248 F. 2d 602 (C. A. D. C.).

Party is a valid ground for denial of a right or privilege, then applicants for (and indeed holders of) such rights or privileges can be required to state, even in the form of a prescribed oath, whether or not that criterion is applicable to them. *American Communications Association* v. *Douds*, 339 U. S. 382; *Garner* v. *Los Angeles Board*, 341 U. S. 716; *Gerende* v. *Election Board*, 341 U. S. 56.[91]

The situation is different with respect to past membership in the Communist Party. A past member may write and sign an affidavit fully setting forth the circumstances of such past membership and still hope to be issued a passport.[92] No automatic denial of the application on the basis of past membership alone is provided for in the regulations. The mandate of Section 51.142 thus contains none of the aspects of an *ex post facto* law or a bill of attainder which the Supreme Court found to be present in the cases relied upon by petitioners (*Pierce* v. *Carskadon*, 16 Wall. 234; *Ex Parte Garland*, 4 Wall. 333; *Cummings* v. *Missouri*, 4 Wall. 277). Since applicants are not faced with the dilemma of either concealing past activity or being denied a passport, Section 51.142 does

[91] This principle was given sharpened definition in *Wieman* v. *Updegraff*, 344 U. S. 183, in which the Court struck down a "loyalty oath" for state employees, not because it was an "oath" provision, but solely because the *content* of the oath referred to activity which was not a valid basis for excluding persons from public employment. 344 U. S. at 190. Cf. *Cummings* v. *Missouri*, 4 Wall. 277, 319–320.

[92] Of course, information as to past Party membership is directly relevant to the issue of whether the applicant is presently a member or presently under the domination or control of the Communist movement.

not, "under the form of creating a qualification or attaching a condition, * * * in effect inflict a punishment for a past act which was not punishable at the time it was committed," or create a "deprivation without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice by the established tribunals." *Cummings* v. *Missouri*, *supra*, at 319, 325.

That the presence of these absent factors is essential to a bill of attainder or "test oath" is settled by the decisions of this Court. Bills of attainder are "legislative acts * * * that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial * * *." *United States* v. *Lovett*, 328 U. S. 303, 315. "Punishment is a prerequisite" (*Garner* v. *Los Angeles Board*, 341 U. S. 716, 722), and the conduct punished must be past conduct. The words of the Court in rejecting arguments identical to petitioners' in *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 413–415, which relied on the same cases petitioners now cite, are peculiarly apposite here (emphasis in the original):

> * * * [I]n the [*Lovett, Garland*, and *Cummings*] decisions, the individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct. Of course, the history of the past conduct is the foundation for the judgment as to what the future conduct is likely

to be; but that does not alter the conclusion that § 9 (h) is intended to prevent future action rather than to punish past action.

* * * [M]embers of those groups identified in § 9 (h) are free to serve as union officers if at any time they renounce the allegiances which constituted a bar to signing the affidavit in the past. * * * In the cases relied upon by the unions * * * since the basis of disqualification was past action or loyalty, nothing that those persons proscribed by its terms could ever do would change the result. * * * We cannot conclude that this section is a bill of attainder.

* * * * *

* * * [T]he casting of § 9 (h) into the mold of an oath does not invalidate it, if it is otherwise constitutional.[93]

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[93] Petitioners' selective quotation of Alexander Hamilton (Pet. Br. 49), as quoted in *Cummings*, designed to show that any oath requirement is a "test oath" and constitutes an unlawful attempt to "shift the burden of proof from the Government to the citizen", is of no avail. First, petitioners conveniently ignore this Court's statement that Hamilton's remarks were made in the course of "a discussion of the nature and character of these expurgatory oaths, *when used as a means of inflicting punishment for past conduct*"; they also omit Hamilton's own reference to "any oath *with retrospect* [sic] *to past conduct* * * *" (4 Wall. at 330, 331; emphasis added). Second, the initial burden rests not with the Government, as petitioners imply, but with the applicant, who, as we have just seen, has the burden as the moving party of coming forward with information relevant to his application. Thus, in *Pacific Power & Light Co.* v. *Federal Power Comm'n*, 111 F. 2d 1014 (C. A. 9), involving an application for approval of a proposed consolidation, the applicant presumably had a constitutional right to use its property as it saw fit, subject only to regulation in conformity with due process, just as the right to travel is subject to reasonable regulation. The court nevertheless held that the burden of proof rested with the proponent of the

Finally, petitioners raise the objection that execution of the required affidavits would subject them to the "danger of an unwarranted perjury prosecution" (Pet. Br. 57). But as we have noted, petitioners are not required to give a "yes" or "no" answer to a set form; they are free to state all the circumstances of Communist Party membership or non-membership and to explain what they mean by the terms they use, so long as the answers are responsive. Any possibility of resulting perjury would be of their own making.

2. *If present Party membership is not, in itself, sufficient for denial of the application:*—Even if the Secretary cannot deny a passport simply on the basis of present Party membership, without more, he is entitled to know the applicant's connection with the Party. The narrowest issue now before the Court is, as Judge Washington indicated below (R. 201, 204), whether "the Secretary has the power—in some cases at least—to deny passports on grounds to which past or present membership in the Communist Party 'may prove relevant' * * * The question whether past or

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merger, not with the regulatory body to whom the application was submitted. Indeed, the very cases cited by petitioners in their attempt to place the burden on the Secretary—*Goodyear Synthetic Rubber Corp* v. *Department of Industrial Relations*, 122 N. E. 2d (Ohio) 503; *Philadelphia Co.* v. *Securities and Exchange Commission*, 175 F. 2d 808 (C. A. D. C.), vacated as moot, 337 U. S. 901; and *Matter of Peck* v. *Cargill*, 167 N. Y. 391 (mis-cited as "197 N. Y.")—demonstrate that the burden lies with petitioners, since in each case the courts placed the burden of proof upon the proponent of the action, rule, or order. See also Section 7 (c) of the Administrative Procedure Act, 5 U. S. C. 1006 (c).

present membership in the Communist Party is in itself sufficient to support denial of a passport is not before us: there has not here been a denial based on such membership." Judge Washington cited *Garner* v. *Los Angeles Board*, 341 U. S. 716, where this Court was called upon to determine the constitutionality of the dismissal of a number of civil service employees of the City of Los Angeles for refusal to file affidavits requiring each employee to state "whether he is or ever was a member of the Communist Party * * *" (*id.* at 719). The statute barred from such employment any person who was a member of any organization or party teaching or advocating the violent overthrow of the Government (*id.* at 717–718). The Court said (*id.* at 720; emphasis added):

> The affidavit raises the issue whether the City of Los Angeles is constitutionally forbidden to require that its employees disclose their past or present membership in the Communist Party or the Communist Political Association. *Not before us is the question whether the city may determine that an employee's disclosure of such political affiliation justifies his discharge.*

Cf. *Korematsu* v. *United States*, 323 U. S. 214, 221–223.

In the same connection, Judge Washington pointed out the present significance of *Konigsberg* v. *State Bar*, 353 U. S. 252 (R. 203). In both that case and this, applicants refused to answer questions relating to Communist Party membership. In *Konigsberg*, the administrative proceedings continued notwithstanding the refusal to answer. The applicant was not informed at the hearing that refusal to answer

was a sufficient independent ground for denial of his application (353 U. S. at 259, note 12), nor did the statutes or rules suggest this (*id.* at 260–261). He was denied admission to the bar, "not * * * simply because he refused to answer questions" (*id.* at 259), but on the basis of an adverse inference drawn from the refusal to answer. The Court held this inference unreasonable in the face of countervailing evidence. Here, on the other hand, the State Department terminated the proceedings upon the refusals to answer. Both the regulations (Sections 51.142 and 51.156, App., *infra*, pp. 115–116) and the administrative officials put petitioners on notice that no action would be taken upon their applications until the information was forthcoming. Each petitioner was "explicitly warn[ed] * * * that he could be barred for this reason alone, * * * and then [was given] a chance to comply" (353 U. S. at 261), but deliberately failed to do so. If this course had been followed in Konigsberg's case, the Court said, "we would be compelled to decide far-reaching and complex questions relating to freedom of speech, press and assembly" (*ibid.*), *i. e.*, the validity of the inquiry *per se*.

In the case of passport applicants, we do not believe that the constitutional questions evoked by an inquiry into Communist Party membership are so far-reaching. See *supra*, pp. 60–73, 75–86; *infra*, pp. 89, *et seq.* But in any event it seems to us that the Secretary cannot be barred from *inquiring*, at the very least, into such Party membership and requiring an answer before he proceeds to a determination of the merits of the application. Communist Party member-

ship is certainly *relevant* to that determination, even if it is not decisive, and the administrators must be able to discover the facts relating to such membership. There is no adequate reason why those relevant facts cannot be obtained from the applicant.

II

THERE IS NO CONSTITUTIONAL OBJECTION TO THE SECRETARY'S REFUSAL TO ISSUE PASSPORTS, FOR FOREIGN TRAVEL, ON GROUNDS RELATED TO PRESENT OR NEAR-PAST COMMUNIST PARTY MEMBERSHIP

In Point I, *supra*, pp. 27–89, we have shown the authority conferred upon the Secretary by the Congress and the President, and that such authority warrants both the regulations at stake in this case and the actions taken by the Department of State with respect to petitioners' passport applications. In the present Point, we support the constitutional validity of these combined actions of the Congress, the President, and the Secretary.

A. THE CONSTITUTION DOES NOT FORBID THE IMPOSITION OF REASONABLE RESTRICTIONS UPON THE TRAVEL OF CITIZENS.

There can be little dispute as to the general power of the Government, acting in its sovereign capacity, to place reasonable restrictions upon the travel of its citizens. Congress has exercised this power almost since the beginning (*supra*, pp. 43–52). The present case involves negative restrictions: the limitation of petitioners' travel to the Western Hemisphere.[94] But the Government may also make affirmative demands of this nature. Thus "the United States

[94] See 22 CFR 53.2, App., *infra*, p. 111.

possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it, and to penalize him in case of refusal." *Blackmer* v. *United States*, 284 U. S. 421, 437.[95] Whether this power resides in Congress or the Executive or both is of no moment for present purposes, for while Thomas Jefferson was of the view that the Chief Executive did not have "the prerogative powers * * * of *retaining within the State*, or recalling to it any citizen thereof, * * * *except so far as he may be authorized from time to time by the legislature to exercise any of those powers*",[96] in this case such legislative authorization is found, as we have shown (*supra*, pp. 43–57), in 8 U. S. C. 1185.[97] The Due Process Clause

[95] That case construed and applied the Act of July 3, 1926, c. 762, 44 Stat. 835, now 28 U. S. C. 1783, in affirming the contempt conviction of a citizen served with subpoenas in France, for failure to appear as a witness in the Supreme Court [now the District Court] of the District of Columbia.

[96] Jefferson, Draft of a Fundamental Constitution for the Commonwealth of Virginia, proposed in 1783 (*Writings*, Ford's ed, 1894, Vol. 3, 155–156), quoted by Mr. Justice McReynolds, dissenting, in *Myers* v. *United States*, 272 U. S. 52, 235. (Emphasis added.)

[97] It is appropriate to note, however, that the discretionary power of the Secretary of State to withhold his sanctioning of a citizen's travel by declining to issue a passport has always carried with it a modicum of power to hamper or embarrass, to a greater or lesser degree, the travel of citizens abroad, since the very purpose of a passport has always been to facilitate the applicant's entry into, or mobility or safety within, a foreign country.

Judge Bazelon's discussion of "The President's Inherent Power [to Control Travel]" in the court below (R. 224–238) is not pertinent to the issues in this case. It is premised upon the incorrect assumption that the Secretary "purports to find" in-

is no bar to reasonable and appropriate regulation of travel. Cf. *Korematsu* v. *United States*, 323 U. S. 214; *Hirabayashi* v. *United States*, 320 U. S. 81. In citing these last two cases, the Court has said (*Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591):

> * * * [T]he Due Process Clause does not shield the citizen from conscription and the consequent calamity of being separated from family, friends, home and business while he is transported to foreign lands to stem the tide of Communism. * * * When citizens raised the Constitution as a shield against expulsion from their homes and places of business, the Court refused to find hardship a cause for judicial intervention.

B. THE DELEGATION OF AUTHORITY IN 8 U. S. C. 1185 IS VALID

In their constitutional attack, petitioners contend that, if 8 U. S. C. 1185 is read as a delegation of authority to control the travel of individuals, it is invalid for lack of definite standards (Pet. Br. 31). The claim is also without merit.[98]

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herent power to place *direct* restraints upon travel, such as are authorized by 8 U. S. C. 1185, in his inherent foreign affairs power (R. 225–228). But the Secretary did not make this claim below, as is indicated by Judge Bazelon's earlier statement of the Secretary's contentions (R. 207–208), nor do we make such a claim here.

[98] An initial jurisdictional problem is raised by the fact that petitioners, while attacking the Secretary's regulations as unauthorized by the statutes and unlawful under the First and Fifth Amendments, did not challenge the constitutionality of the statutes themselves in their complaints (R. 2–4, 100–103). Accordingly, the constitutionality of 8 U. S. C. 1185 should not be open to attack by them here. It should be noted that, had petitioners challenged the constitutionality of the statute in

As Judge Fahy noted in his dissenting opinion (R. 242, 243 (emphasis added)):

> * * * This was an assertion by Congress of restraint upon travel *based upon the war power*, coupled with the *executive control over passports incident to the conduct of foreign affairs* * * *. The new statute, however, did not enumerate other specific criteria [than owing allegiance], notwithstanding a passport thenceforth was not merely a political document the denial of which entailed no deprivation of liberty. But I do not think the absence from 8 U. S. C. § 1185 (b) of more specific criteria renders nugatory the control in question. The statute *explicitly limits the control to a time of war or of a presidentially proclaimed national emergency, and to passports.* Control related to the war powers and to the conduct of foreign affairs is thus plainly intended. In order to be validly exercised the powers thus invoked, though subject to the Constitution, are not held to the same degree of legislative or other specificity as are those of government generally. * * * I would interpret the control enacted by Congress as valid when exercised consistently with due process to prevent the reasonable likelihood of harm to our national defense or to the conduct of our foreign affairs. * * *

The contention that the standards of this particular statute "are void to the extent that they contain unconstitutional delegations of legislative power"

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the District Court, a problem as to convening a three-judge district court would have arisen. See 28 U. S. C. 2282; cf. *Bauer* v. *Acheson*, 106 F. Supp. 445 (D. D. C., three-judge district court).

(*United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 542) is not new to this Court. In *Knauff*, in which the Court upheld the exclusion under the alien provisions of the statute of the alien wife of an American soldier, on the basis of confidential information and with no hearing, the Court first held the statute constitutional.[99] While the Court pointed out that the right to exclude aliens "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation" (338 U. S. at 542), and while we make no claim of such inherent executive power to restrict the travel of citizens (see *supra*, note 97, pp. 90–91), it is nonetheless true that the instrument chosen by Congress to effectuate emergency travel controls for citizens—the passport power—*is* such an executive function and is likewise based upon the "power to control the foreign affairs of the nation", at least as much as is the power of exclusion (see *supra*, pp. 29–42).[100]

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[99] See also *Kwong Hai Chew* v. *Colding*, 344 U. S. 590; *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206.

[100] In ruling that "Congress may in broad terms authorize the executive to exercise the power, *e. g.*, as was done here, for the best interests of the country during a time of national emergency" (338 U. S. at 543), the Court placed great reliance upon *Lichter* v. *United States*, 334 U. S. 742, a case upholding a statute (the Renegotiation Act) unrelated to the foreign affairs power. The Court quoted from *Lichter* as follows (338 U. S. at 543):

> It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program. * * * Standards prescribed by Congress are to be read in the light of the conditions

In enacting the original 1918 travel-control statute, Congress was, as we have seen, fully aware of the delegation problem (*supra*, p. 47). It expressly declared, however, that "It is essential to meet the situation that the Executive should have wide discretion and wide authority of action. No one can foresee the different means which may be adopted by hostile nations to secure military information or spread propaganda and discontent" (H. Rept. No. 485, 65th Cong., 2d Sess., p. 3).

In judging the validity of the statutory standards—already held valid in relation to aliens—as applied to the travel of citizens, it is noteworthy that in no instance has this Court invalidated, on such grounds, an act of Congress which invoked the war power or related to the inherent Executive powers in foreign affairs.[101] Moreover, where Congress has, as here,

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to which they are to be applied. "They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear."

[101] In *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, the Court expressly contrasted the National Recovery Act with previous statutory delegations held valid which related to the war power and which "confided to the President * * * an authority which was cognate to the conduct by him of the foreign relations of the Government" (293 U. S. at 422; see also 423–430).

With respect to the war power generally, see *Hirabayashi* v. *United States*, 320 U. S. 81, 93; *Ludecke* v. *Watkins*, 335 U. S. 160; *Korematsu* v. *United States*, 323 U. S. 214; *Yakus* v. *United States*, 321 U. S. 414; *Home Bldg. & L. Assn.* v. *Blaisdell*, 290 U. S. 398, 426; *United States* v. *Chemical Foundation*, 272 U. S. 1, 12; *McKinley* v. *United States*, 249 U. S. 397; *Selective Draft Law Cases*, 245 U. S. 366; *Stewart* v. *Kahn*, 11 Wall. 493, 506–507; *Miller* v. *United States*, 11 Wall. 268, 303–314.

enacted without challenge, over the past 143 years, legislation similar to that now in force (*supra*, pp. 44–52), the gloss of history lends its weight to the presumption of validity. *Ludecke* v. *Watkins*, 335 U. S. 160, *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304.

As for the war power, the fact that we are not engaged in active hostilities at the present time is immaterial to the continuing validity of the statute, for the war powers "necessarily include authority to take preventive measures against activities that may cause international misunderstandings, which, in turn, may lead to war, as well as against endeavors to subvert, undermine, or overthrow the government". *United States* v. *Peace Information Center*, 97 F. Supp. 255 at 261 (D. D. C.); see also *Henderson* v. *Bryan*, 46 F. Supp. 682, 685 (S. D. Cal.); *Ashwander* v. *T. V. A.*, 297 U. S. 288; cf. *United States* v. *Nugent*, 346 U. S. 1, 9 (peacetime draft statute); *Ludecke* v. *Watkins*, 335 U. S. 160; *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 116; *Hamilton* v. *Kentucky Distilleries & W. Co.*, 251 U. S. 146, 161; *Stewart* v. *Kahn*, 11 Wall. 493.

The nature of the foreign affairs powers of the President and his subordinates, the broad discretion which is his in exercising that power even when his actions may impinge upon the constitutional rights of citizens, and the limited role of Congress as well as of the courts in regard to this power, need not be recalled to the Court. On the problem of legislative delegation in this field, the Court said in *United*

States v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319–320, 321–322:

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. * * *
>
> * * * * *
>
> * * * [W]hat we have * * * said on the subject, discloses the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed * * *
>
> * * * [T]his court should not be in haste to apply a general rule which will have the effect of condemning legislation like that under review as constituting an unlawful delegation of legislative power.[102]

See also *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635–636, note 2 (concurring opinion of Mr. Justice Jackson); *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 588–589; *Carlson* v. *Landon*, 342 U. S. 524, 542–544; *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 542; *Ludecke* v. *Watkins*, *supra*; *Chicago & Southern Air Lines, Inc.* v. *Waterman*

[102] It is noteworthy that the statute there under consideration did not invoke the war power.

Corp., 333 U. S. 103, 109–110; *Yakus* v. *United States*, 321 U. S. 414, 462–463; *United States* v. *Pink*, 315 U. S. 203; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302; *Foster* v. *Neilson*, 2 Pet. 253.

The limitations on the Executive contained in 8 U. S. C. 1185 are, as Judge Fahy implied (*supra*, p. 92), as explicit as possible in the circumstances confronting Congress. The powers there granted may be invoked only if one of two conditions exist: war or proclaimed national emergency. But these conditions do not alone suffice to bring the powers into play; the President must additionally "find that the interests of the United States require" the invocation of travel controls, and must make a public proclamation of this finding. And by making the passport the instrument for effecting control, Congress has also limited the exercise of the control power to cases relating to the national defense and the related conduct of foreign affairs in time of war or emergency.[103] Since these limitations are expressed in the statute, we need not be concerned with the question of whether a delegation of travel-control power with no limitations, with other limitations, or for other purposes, would be valid. Cf. *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100–101.

C. TRAVEL RESTRICTION ON GROUNDS TO WHICH COMMUNIST PARTY MEMBERSHIP IS RELEVANT DOES NOT VIOLATE THE FIRST AMENDMENT.

Petitioners urge that travel control on grounds to which Communist Party membership is pertinent vio-

[103] See note 54, *supra*, p. 53.

lates the First Amendment[104] (Pet. Br. 39–47). Their theory appears to be that First Amendment rights are unlawfully abridged whenever Government action affecting a citizen takes such membership into account, except in the case of criminal prosecutions under the Smith Act or other statutes (Pet. Br. 40).

We have already pointed out (*supra*, pp. 60–75) the reasonableness of denying passports—and therefore travel rights—to persons who are now Communist Party members or under Party control. Their connection with the world Communist movement is such that this country does not have to take the risk that foreign travel which is purportedly innocent in purpose may well turn out to be an instrument of the Soviet Union—for espionage, for communication of information, as a courier, for the other uses to which a firm adherent of another power may be put. In time of war, travel to, or for the purposes of, an enemy country may be prohibited, even if the avowed purpose is innocent; in the present times, it is not unreasonable to restrict the travel of individuals who are in fact adherents of a foreign movement so basically hostile to this country as is the Communist movement.

And it now goes without saying that First Amendment rights are not absolute; they may not be raised as an automatic barrier, regardless of circumstances,

[104] We do not discuss petitioners' contentions relating to activities other than Communist Party membership (Pet. Br. 39–42), since the sole issue in these cases is whether the Secretary may require a statement with respect to such membership.

to the consideration of Communist Party membership in denying a passport in order to guard against the evils of possible future conduct. "* * * [T]he right of the public to be protected from evils of conduct, even though First Amendment rights of persons or groups are thereby in some manner infringed, has received frequent and consistent recognition by this Court". *American Communications Association* v. *Douds,* 339 U. S. 382, 398. In sustaining a requirement that each officer of a union seeking access to the National Labor Relations Board file an affidavit "that he is not a member of the Communist Party * * * ", the Court held in *Douds:*

> The fact that the statute identifies persons by their political affiliations and beliefs, which are circumstances ordinarily irrelevant to permissible subjects of government action, *does not lead to the conclusion that such circumstances are never relevant.* * * * [339 U. S. at 391; emphasis added.]
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> * * * * * *
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> * * * Communists, we may assume, carry on legitimate political activities. Beliefs are inviolate.* * * Congress may reasonably find, however, that Communists, unlike members of other political parties, * * * represent a continuing danger of disruptive political strikes when they hold positions of union leadership. * * * [*Id.* at 393.]

Even direct limitations upon political activity, whether or not in behalf of the Communist Party, are permissible when such limitations, reasonable and appropriate in themselves, are found necessary by

Congress to effectuate a lawful governmental objective. *United Public Workers* v. *Mitchell,* 330 U. S. 75.

This Court has not blinded itself to the activities of the Communist Party which go beyond the bounds of constitutional protection. As a result, it has on several occasions, in addition to *Douds,* upheld governmental action based in part if not wholly upon membership in the Communist Party, the First Amendment notwithstanding. It has permitted the denial of bail to long-resident aliens pending determination of deportability on the basis of Communist Party membership and activities, *Carlson* v. *Landon,* 342 U. S. 524; and it has permitted the deportation of resident aliens on grounds of *past* Party membership, without requiring knowledge of the Party's aims. *Harisiades* v. *Shaughnessy,* 342 U. S. 580, 591–592; *Galvan* v. *Press,* 347 U. S. 522; cf. *Rowoldt* v. *Perfetto,* 355 U. S. 115. It has sustained convictions of conspiracy to organize the Communist Party. *Dennis* v. *United States,* 341 U. S. 494. See also the other cases cited, *supra,* pp. 67–68, 83–85. The factors—well-known to the Court—which support these decisions likewise justify a holding that the First Amendment (as well as the Due Process clause) does not require the Secretary of State to ignore Communist Party membership in rendering a passport decision.

D. THE AFFIDAVIT REQUIREMENT DOES NOT IMPOSE AN INVALID "TEST OATH", A BILL OF ATTAINDER, OR AN EX POST FACTO PENALTY

We have already answered (*supra,* pp. 81–86) petitioners' arguments (Pet. Br. 47–52) that the affidavit

requirement is unconstitutional as imposing a "test oath", as well as constituting a bill of attainder and an *ex post facto* penal law.[105]

CONCLUSION

For the foregoing reasons, it is submitted that the judgments below should be affirmed.

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MARCH 1958.

[105] As earlier indicated (*supra*, p. 24), we do not discuss in this case petitioners' contentions concerning those portions of the State Department regulations which have not yet been applied to them. See *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535; *Franklin* v. *Jonco Aircraft Corp.*, 346 U. S. 868; *Gusik* v. *Schilder*, 340 U. S. 128; *Fahey* v. *Mallonee*, 332 U. S. 245; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752; *Yakus* v. *United States*, 321 U. S. 414; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Bourjois* v. *Chapman*, 301 U. S. 183; *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117. Thus, we do not discuss the contentions that possible future denials in petitioners' cases might "impair substantive due process" (Pet. Br. 47), or that the regulations, if applied, would "deny procedural due process" (Pet. Br. 52–57). These matters are discussed in our brief in No. 681, a case of actual denial of a passport after the completion of the established procedures.

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APPENDIX A

STATUTES AND REGULATIONS

1. Section 215 of the Immigration and Nationality Act of 1952, Act of June 27, 1952, c. 477, Title II, c. 2, 66 Stat. 190, 8 U. S. C. 1185, as codified, is as follows in pertinent part:

> § 1185. *Travel control of citizens and aliens during war or natural emergency—(a) Restrictions and prohibitions on aliens.*
>
> When the United States is at war or during the existence of any national emergency proclaimed by the President, * * * and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—
>
> (1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;
>
> (2) * * *
>
> (3) for any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;
>
> * * * * * *

(*b*) *Citizens.* After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

The pertinent provisions of Sections 2 and 6 of Internal Security Act of 1950, Act of September 950, c. 1024, 64 Stat. 987, 993, 50 U. S. C. 781, 785, odified in the United States Code as follows:

§ 781. *Congressional finding of necessity.*

As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress finds that—

* * * * * *

(8) Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement.

(9) In the United States those individuals who knowingly and willfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement.

* * * * *

(15) * * * The Communist organization in the United States * * * present[s] a clear and present danger to the security of the United States and to the existence of free American institutions * * *.

* * * * * *

§ 785. *Denial of passports to members of Communist organizations.*

(a) When a Communist organization as defined in paragraph (5) of section 782 of this title is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

(2) to use or attempt to use any such passport.

(b) When an organization is registered, or there is in effect a final order of the Board requiring an organization to register, as a Communist-action organization, it shall be unlawful for any officer or employee of the United States to issue a passport to, or renew the passport of, any individual knowing or having reason to believe that such individual is a member of such organization.

3. The pertinent portions of Presidential Proclamation No. 2914, December 16, 1950, 64 Stat. A454, are as follows:

A PROCLAMATION

WHEREAS recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and

WHEREAS world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and

WHEREAS, if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; and

WHEREAS the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible:

NOW, THEREFORE, I, HARRY S TRUMAN, President of the United States of America, do proclaim the existence of a national emergency * * *.

* * * * *

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

Done at the City of Washington this 16th day of December, 10:20 a. m., in the year [SEAL] of our Lord nineteen hundred and fifty, and of the Independence of the United States of America the one hundred and seventy-fifth.

HARRY S TRUMAN.

By the President:

DEAN ACHESON

Secretary of State

4. The pertinent portions of Presidential Proclamation No. 3004, January 17, 1953, 67 Stat. C31, "Control

Persons Leaving or Entering the United States
y the President of the United States of America",
e as follows:

A PROCLAMATION

WHEREAS section 215 of the Immigration and Nationality Act, enacted on June 27, 1952 (Public Law 414, 82nd Congress; 66 Stat. 163, 190), authorizes the President to impose restrictions and prohibitions in addition to those otherwise provided by that Act upon the departure of persons from, and their entry into, the United States when the United States is at war or during the existence of any national emergency proclaimed by the President * * * and when the President shall find that the interests of the United States so require; and

WHEREAS the national emergency the existence of which was proclaimed on December 16, 1950, by Proclamation 2914 still exists; and

WHEREAS because of the exigencies of the international situation and of the national defense then existing Proclamation No. 2523 of November 14, 1941, imposed certain restrictions and prohibitions, in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States; and

WHEREAS the exigencies of the international situation and of the national defense still require that certain restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of title 3 of the United States Code, do hereby find and publicly proclaim that the

interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States; and I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

1. The departure and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as sections 53.1 to 53.9, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

* * * * * *

4. Proclamation No. 2523 of November 14, 1941, as amended by Proclamation No. 2850 of August 17, 1949, is hereby revoked, but such revocation shall not affect any order, determination, or decision relating to an individual, or to a class of individuals, issued in pursuance of such proclamations prior to the revocation thereof, and shall not prevent prosecution for any offense committed, or the imposition of any penalties or forfeitures, liability for which was incurred under such proclamations prior to the revocation thereof; and the provisions of this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, shall be in addition to, and shall not be held to revoke, supersede, modify, amend, or suspend, any other proclamation, rule, regulation, or order heretofore issued relating to the departure of persons from, or their entry into,

the United States; and compliance with the provisions of this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, shall not be considered as exempting any individual from the duty of complying with the provisions of any other statute, law, proclamation, rule, regulation, or order heretofore enacted or issued and still in effect.

5. I hereby direct all departments and agencies of the Government to cooperate with the Secretary of State in the execution of his authority under this proclamation and any subsequent proclamation, rule, regulation, or order issued in pursuance hereof; and such departments and agencies shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws thereof the utmost diligence in preventing violations of section 215 of the Immigration and Nationality Act and this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, and in bringing to trial and punishment any persons violating any provision of that section or of this proclamation.

To the extent permitted by law, this proclamation shall take effect as of December 24, 1952.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the City of Washington this 17th day of January in the year of our Lord nineteen hundred and fifty-three and of the Independence of the United States of America the one hundred and seventy-seventh.

[SEAL] HARRY S TRUMAN

By the President:

DEAN ACHESON

Secretary of State

5. The pertinent sections of Title 22 of the United States Code are as follows:

§ 211a. *Authority to grant, issue, and verify passports.*

The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls, when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States; under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports. [Act of July 3, 1926, c. 772, Section 1, 44 Stat. 887.]

§ 212. *Who entitled to passport.*

No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States. [R. S. Section 4076; Act of June 14, 1902, c. 1088, Section 2, 32 Stat. 386.]

§ 213. *Application for passport; fees for taking.*

Before a passport is issued to any person by or under authority of the United States such person shall subscribe to and submit a written application duly verified by his oath before a person authorized and empowered to administer oaths, which said application shall contain a true recital of each and every matter of fact which may be required by law or by any rules authorized by law to be stated as a prerequisite to the issuance of any such passport. [Act of June 15, 1917, c. 30, Title IX, Section 1, 40 Stat. 227.]

6. The pertinent sections of Executive Order No. 7856, March 31, 1938, 3 F. R. 799, as found in Part 51 of Title 22 of the Code of Federal Regulations, are as follows:

§ 51.14. *Contents of Applications.*

[Identical to 22 U. S. C. 213; *supra.*]

* * * * *

§ 51.74. *Affidavits.*

Any affidavit which may be required under the rules in this part or shall be submitted in support of an application for a passport or the renewal, extension, or amendment of a passport shall be considered as, and become, a part of the application.

§ 51.75. *Refusal to issue passport.*

The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to restrict it against use in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries.

* * * * *

§ 51.77. *Secretary of State authorized to make passport regulations.*

The Secretary of State is authorized to make regulations on the subject of issuing, renewing, extending, amending, restricting, or withdrawing passports additional to the rules in this part and not inconsistent therewith.

7. The pertinent portions of the regulations issued by the Secretary of State, as found in Parts 51 and 53 of Title 22 of the Code of Federal Regulations, are as follows:

(*a*) From Departmental Order No. 1003, November 25, 1941, 6 F. R. 6069, as amended by Depart-

nental Regulation No. 11, August 27, 1945, 10 F. R. 11046, in Part 53:

§ 53.1 *Limitations upon travel.* No citizen of the United States or person who owes allegiance to the United States shall depart from or enter into or attempt to depart from or enter into the continental United States, the Canal Zone, and all territories, continental or insular, subject to the jurisdiction of the United States, unless he bears a valid passport which has been issued by or under authority of the Secretary of State and which, in the case of a person entering or attempting to enter any such territory, has been verified by an American diplomatic or consular officer either in the foreign country from which he started his journey, or in the foreign country in which he was last present if such country is not the one from which he started his journey, or unless he comes within one of the exceptions prescribed in §§ 53.2 and 53.3 * * *.

§ 53.2 *Exceptions to regulations in § 53.1.* No valid passport shall be required of a citizen of the United States or a person who owes allegiance to the United States: * * *.

* * * * *

(b) When traveling between the United States and any country or territory in North, Central or South America or in any island adjacent thereto; *Provided*, That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States via any country or territory in North, Central, or South America or in any island adjacent thereto, for which a valid passport is required under §§ 53.1–53.9; * * *.

* * * * *

§ 53.8 *Discretional exercise of authority in passport matters.* Nothing in this part shall be construed to prevent the Secretary of State

from exercising the discretion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries.

* * * * * *

(*b*) From Departmental Order No. 749, March 31, 1938, in Part 51:

§ 51.134 *Applications to be made out completely on most recent forms.* Application for passports should be made on the most recent form or forms prepared by the Department of State and should contain complete information called for in such form or forms.

(*c*) From Departmental Regulation No. 108.162, August 28, 1952, 17 F. R. 8013,[1] as amended by Departmental Regulation No. 108.276, January 10, 1956, 21 F. R. 336, in Part 51 of the 1956 Supplement:

§ 51.135. *Limitations on issuance of passports to persons supporting Communist movement.*

In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the pur-

[1] The preamble to this regulation read as follows:

Pursuant to the authority vested in me by paragraph 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F. R. 681; 22 CFR 51.77), under authority of section 1 of the Act of Congress approved July 3, 1926 (44 Stat. 887; 22 U. S. C. 211 (a)), the regulations issued on March 31, 1938 (Departmental Order 749) as amended (22 CFR 51.101 to 51.134) are hereby further amended by the addition of new sections 51.135 to 51.143 as follows: * * *

poses of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:

(a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they continue to act in furtherance of the interests and under the discipline of the Communist party;

(b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement;

(c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement.

§ 51.136.[2] *Limitations on issuance of passports to certain other persons.*

In order to promote and safeguard the interests of the United States, passport facilities, except for direct and immediate return to the

[2] Prior to the amendment of January 10, 1956, this section read as follows:

§ 51.136. *Limitations on issuance of passports to persons likely to violate laws of the United States.*

In order to promote the national interest by assuring that the conduct of foreign relations shall be free from unlawful interference, no passport, except one limited for direct and immediate return to the United States, shall be issued to per-

United States, will be refused to a person when it appears to the satisfaction of the Secretary of State that the person's activities abroad would: (a) violate the laws of the United States; (b) be prejudicial to the orderly conduct of foreign relations; or (c) otherwise be prejudicial to the interests of the United States.

§ 51.137. *Notification to persons whose passport application is tentatively disapproved.*

A person whose passport application is tentatively disapproved under the provisions of § 51.135 or § 51.136 will be notified in writing of the tentative refusal, and of the reasons on which it is based, as specifically as in the judgment of the Department of State security considerations permit. He shall be entitled, upon request, and before such refusal becomes final, to present his case and all relevant information informally to the Passport Division. He shall be entitled to appear in person before a hearing officer of the Passport Division, and to be represented by counsel. He will, upon request, confirm his oral statements in an affidavit for the record. After the applicant has presented his case, the Passport Division will review the record, and after consultation with other interested offices, advise the applicant of the decision. If the decision is adverse, such advice will be in writing and shall state the reasons on which the decision is based as specifically as within the judgment of the Department of State security limitations permit.

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sons as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities while abroad which would violate the laws of the United States, or which if carried on in the United States would violate such laws designed to protect the security of the United States.

Such advice shall also inform the applicant of his right to appeal under § 51.138.

* * * * *

§ 51.141. *Bases for findings of fact by Board [of Passport Appeals].*

(a) In making or reviewing findings of fact, the Board, and all others with responsibility for so doing under §§ 51.135 to 51.143, shall be convinced by a preponderance of the evidence, as would a trial court in a civil case.

(b) Consistent and prolonged adherence to the Communist Party line on a variety of issues and through shifts and changes of that line will suffice, prima facie, to support a finding under § 51.135 (b).

§ 51.142. *Oath or affirmation by applicant as to membership in Communist Party.*

At any stage of the proceedings in the Passport Division or before the Board, if it is deemed necessary, the applicant may be required, as a part of his application, to subscribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist Party. If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings.

§ 51.143.[3] *Applicability of §§ 51.137–51.142.*

Except for action taken by reason of noncitizenship or geographical limitations of general applicability necessitated by foreign policy

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[3] Prior to the amendment of January 10, 1956, this section read as follows:

§ 51.143. *Applicability of § 51.135 to § 51.142.*

When the standards set out in § 51.135 or § 51.136 are made relevant by the facts of a particular case to the exercise of the discretion of the Secretary under § 51.75, the standards in §§ 51.135 and 51.136 shall be applied and the procedural safeguards of §§ 51.137 to 51.142 shall be

considerations, the provisions of §§ 51.137–51.142 shall apply in any case where the person affected takes issue with the action of the Secretary in granting, refusing, restricting, withdrawing, canceling, revoking, extending, renewing, or in any other fashion or degree affecting the ability of such person to receive or use a passport.

(*d*) From Departmental Regulation No. 108.210, January 4, 1954, 19 F. R. 161, in Part 51 of the 1956 Supplement:

§ 51.156. *Prior administrative remedies.* It is required that prior to petitioning for an appeal [to the Board of Passport Appeals], an applicant shall (a) exhaust the administrative remedies available in the Passport Office, as set out in § 51.137, and (b) comply with the provisions of § 51.142, as a part of his application, if deemed necessary by the Passport Office.

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followed in any case where the person affected takes issue with the action of the Department in granting, refusing, restricting, withdrawing, cancelling, revoking, extending, renewing, or in any other fashion or degree affecting the ability of a person to use a passport through action taken in a particular case.

APPENDIX B

EXCERPTS FROM THE REPORT OF THE COMMISSION ON GOVERNMENT SECURITY (1957), PAGES 470–475

PASSPORT SECURITY PROGRAM

* * * * *

RECOMMENDATIONS

Necessity

A passport security program is necessary to deter travel abroad by subversives bent on missions detrimental to the United States and to narrow as much as possible the sphere of Soviet international conspiratorial activity in the fields of espionage and propaganda.

Abundant evidence exists to support this finding. There is a long history of insidious use of travel documents, not only in the United States but in other nations of the free world, to further the Communist objective of world domination.

The passport is an important instrument in support of the recognized Communist technique of communication by personal contact. It has been employed over the years to insure the presence of American Communists and Americans under Communist discipline at Soviet centers for indoctrination and training, including the Lenin School in Moscow. It has been utilized by Communist sympathizers as a vehicle for their attendance at and participation in activities of international Communist propaganda organizations. It has been a device for the movement of Soviet agents and spies into and out of the United States and other free nations of the world.

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The Internal Security Act of 1950, prohibiting the issuance of passports to members of Communist organizations registered or required to be registered by the Subversive Activities Control Board, enunciated the statutory necessity for travel restrictions in the following language:

"Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement."[1]

In retrospect, the Internal Security Act of 1950 can be viewed as a crystallizing force that terminated fluctuations of State Department passport policies and procedures prevalent for years.

These fluctuations are reviewed in the following excerpts from one of the State Department's own documents:

"Shortly after the Bolshevik Revolution of 1917 this Government became aware of the scope and danger of the worldwide revolutionary movement and the attendant purpose to overthrow all existing governments, including our own. As a countermeasure passports were refused to American Communists who desired to go abroad for indoctrination, instruction, etc. This policy was continued until 1931 when Secretary Stimson reversed the previous rulings. Thereafter until World War II no persons were refused passports because they were Communists.

* * * * * *

"After the termination of hostilities and the return of travel to more normal conditions, the question

[1] 50 U. S. C. sec. 781.

came up as to whether the Department would issue regular passports to individuals if they were Communists. At first passports were refused, but the matter was reconsidered at the highest level of the Department in early 1948 and the decision was made that passports would be issued to Communists and supporters of communism who satisfied the Department that they did not intend, while abroad, to engage in the promotion of Communist activities. At the same time the decision was made that passports should be refused to persons whose purpose in traveling abroad was believed to be to subvert the interest of the United States. Later in the same year the policy was modified to permit the issue of passports to Communist journalists even though they were actively promoting the Communist cause. In September 1950 the Passport Division raised the question, in connection with pending passport applications by Communistic journalists, whether this policy should be modified. It was pointed out that ten members of the National Committee of the Communist Party had been convicted of violating the Smith Act; that the Communists were actively supporting the enemy position in the Korean war, and that the Internal Security Act of 1950 clearly showed the desire of Congress that no Communists should be issued passports of this Government.

"The Department also took into consideration its own experience that ever since the end of World War I, American Communists and alien Communists illegally in possession of American passports had effectively carried on abroad espionage, propaganda and revolutionary activities on behalf of the Soviet Government and the international Communist movement and contrary to the foreign policy of the United States Government. The matter was referred to the Legal Adviser who agreed that it was the duty of

the State Department to refuse passports to all Communists, including journalists."[2]

In the operation of its espionage apparatus in the United States, the Soviet Government has frequently interchanged its agents in Canada, Mexico, and this country, using fraudulent passports in the process.[3]

Here in the United States, false naturalization and birth certificates have been employed in making applications for passports. False names have been used. Identities of other persons, many of them long since dead, have been assumed. Birth certificates of living persons have been bought, and there have been instances where municipal officials have been paid to record births and issue certificates for persons who never existed.[4]

* * * * * * *

Since the Spanish Civil War there has been a great increase in the number of applicants concealing their true destination and purpose of travel.

During the Spanish war, between 2,000 and 3,000 Americans, who obtained passports for travel to some other country, went to Spain and joined the international brigade although their passports were stamped "not valid for travel to Spain." These Americans were required to turn over their passports to the headquarters of the international brigade in Albacete, Spain, "for safekeeping." Most of these passports eventually wound up in Moscow for alteration and possible use by Soviet agents. The United States, as a countermeasure, then replaced every outstanding

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[2] Refusal of passports to Communists, State Department memorandum, May 29, 1956, pp. 1, 2.

[3] The Shameful Years, Thirty Years of Soviet Espionage in the United States, H. Rept. 1229, 84th Cong., 2d sess., p. 4.

[4] Senate Internal Security Subcommittee hearings on "Scope of Soviet activity in the United States," pt. 27, app. I, p. 1497 and 1498.

passport in the world with a new-type document to prevent use of the old ones by Soviet agents.[5]

American supporters of international Communism have frequently certified that their trips abroad for business or pleasure contemplated visits only to certain designated countries. Upon arrival overseas, however, they have breached the restrictions stated in their passports and have passed through the Iron Curtain to become officials, delegates, and observers at conferences of Soviet-dominated propaganda organizations that have spawned infamous denunciations of the United States. Their passports, except for a few isolated instances, do not reflect entry or exit visas evidencing travel behind the Iron Curtain. These have been stamped on a slip of paper which was removed from their possession at the time of their return to the free world.[6] The detached visa device to conceal the fact of visits to the Soviet Union from agencies of the United States Government is known to have existed as far back as 1927.[7]

The Communist-inspired Asian and Pacific peace conference in Peking, China, in October 1952, which was attended by 15 American delegates, is a typical example of concealment.

Henry Willcox and his wife, Anita, of Long Island and Connecticut, despite their records of Communist sympathy, secured passports ostensibly to visit France and Turkey for business. Their passports carried the prevailing restriction against travel behind the Iron

[5] Pt. 23, hearings on scope of Soviet activity in the United States, Internal Security Subcommittee, Committee on the Judiciary, U. S. Senate, May 9–10, 1956, p. 1220–1222.

[6] H. Rept. 53, 85th Cong., 1st sess., annual report of Committee on Un-American Activities for the year 1956, p. 14.

[7] Report of the Subversive Activities Control Board (*Brownell v. Communist Party of the United States of America*), S. Doc. 41, 83d Cong., 1st sess., p. 106.

Curtain, but they showed up in Moscow and boarded a plane that took them to Peking, where Mrs. Willcox read a speech to the conference and Willcox served as vice chairman of the American delegation.

* * * * *

The committee [i. e., House Committee on Un-American Activities] also called several of the American delegates to the World Youth Festival held in Warsaw in 1955. All had concealed their purpose of travel, they were found to have been affiliated with the Communist Party and they refused to answer questions about their passport applications, their travel abroad, and their conduct at the conference.[12]

Of 1,905,152 applications received from September 1, 1952, to August 1, 1956, the Passport Office tentatively denied 275 for security reasons. There were final denials in 29 security cases by the Passport Office from January 4, 1954, to July 31, 1955, and none from August 1, 1955, to August 1, 1956. Final denials by the Secretary of State for 1955 for security reasons totaled 13. However, some indication of the deterrent effect of the program can be deduced from the figures showing that 54 passports were not issued between January 1, 1956, and August 1, 1956, "because of failure or refusal of applicant to execute affidavits" demanded by the Passport Office.[13]

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For the reasons specified, we must conclude that a passport security program is a necessity and should be continued subject to changes and modifications delineated with more particularity hereinafter in this report.

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[12] H. Rept. 53, 85th Cong., 1st sess., annual report of Committee on Un-American Activities for the year 1956, pp. 15, 16.

[13] Passport Office response to Commission on Government Security interrogatory, Oct. 3, 1956.

APPENDIX C

Memorandum and Regulations Relating to Denials of Passports to "Revolutionary Radicals" and Others, 1920–1948

1. Portions of a Memorandum of the Under Secretary of State, November 30, 1920:

Code #5000

Department of State,
Office of the Under Secretary,

November 30, 1920.

MEMORANDUM RE APPLICANTS FOR PASSPORTS WHO ARE BOLSHEVISTS OR WHO ARE CONNECTED WITH BOLSHEVIST GOVERNMENT.

Thus far, no definite policy appears to have been adopted by the Department with respect to applicants for passports who openly sympathize with or espouse the cause of the Soviet Government: or persons who are members of organizations or associations that have signified their adherence to the principles and doctrines of Bolshevism; or persons who are engaged either directly or indirectly in propaganda for, or other assistance to, the Soviet Government. As a consequence, each case falling within any of the foregoing categories appears to have been decided without reference to any previous case of a similar nature, and the officer making the decision has, it appears, been guided solely by his own ideas and impressions as gleaned from an examination of the correspondence and reports respecting the individual applicant.

There are now before the Department a number of cases falling within the foregoing

description, decision respecting which should form a basis for action in and facilitate the handling of similar cases in the future.

[There follow summaries of the activities of four passport holders or applicants active in the Bolshevist movement, including one whose "passport was taken up by the Bolshevist authorities and it was subsequently reported that it had been given to a dangerous Bolshevist agitator by the name of Malkin who would endeavor to gain admission to the United States through its use."]

In its dealings with applicants for passports of the above descriptions, this office has endeavored to follow the spirit of the Secretary's note to the Italian Ambassador outlining this Government's attitude toward the Soviet regime. Any assistance in the way of passport facilities, which this Government may render to a person who is working either directly or indirectly in behalf of the Soviet Government is a help to the Soviet Government and tends to delay the day of fulfillment of the hope expressed in the Italian note that the "Russian people" will overcome the existing anarchy, suffering and destitution and "again take a leading place in the world".

It is therefore recommended that passports be refused to persons who fall within any of the following categories.

(1) Any person who counsels or advocates publicly or privately the overthrow or the bringing about of reforms or changes in organized Governments by force:

(Example) Members of the Communist Party; the I. W. W.; the Communist Labor Party; or any other organization of a similar nature.

(2) Any person who actively espouses the cause of the Soviet Government either through public expression or by the distribution or dissemination of Bolshevist propaganda.

(3) Any person who is directly or indirectly working for the Bolshevist Government, (a) correspondents of publications such as the London Daily Herald, Soviet Russia, and other known Bolshevist organs; (b) Employees of the Soviet Government in this and other countries; and (c) carriers of Bolshevist correspondence.

Office Instructions of December 16, 1920:

ABSTRACT OF PASSPORT LAWS AND PRACTICE

(Office Instructions)

Code No. 5000
DECEMBER 16, 1920.

REFUSALS IN THE CASE OF ANARCHISTS, AND REVOLUTIONARY RADICALS

The Department will refuse passports to radicals who fall within any one of the following classes:

> Citizens who are anarchists; citizens who believe in or advocate the overthrow by force or violence of the Government of the United States or of all forms of law; citizens who disbelieve in or are opposed to all organized government; citizens who advocate or teach the assassination of public officials; citizens who advocate or teach the unlawful destruction of property; citizens who are members of or are affiliated with any organization that entertains a belief in, teaches, or advocates the overthrow by force or violence of the Government of the United States or of all forms of law, or that entertains or teaches disbelief in or opposition to all organized government, or that advocates the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific

individuals or of officers generally, of the Government of the United States or of any other organized government, because of his or their official character, or that advocates or teaches the unlawful destruction of property.

It should be stated that the wording of the definition above is almost precisely that of Section I of the Act of October 16, 1918, which defines aliens radicals to be excluded and expelled from the United States. The only difference is in the substitution of the word "citizen" for "alien".

In every case, action upon reports, showing that a person comes within one of the classes noted, should be based upon specific facts. Each case should be adjusted upon tangible and incontrovertible evidence of revolutionary activity, rather than on suspicion.

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PHILIP ADAMS,
Chief, Division of Passport Control.

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3. Office Instructions of May 4, 1921:

ABSTRACT OF PASSPORT LAWS AND PRECEDENTS

(Passport Division Office Instruction)

Code No. 5005
MAY 4, 1921.

Subject: *Grounds on Which the Issuance of Passports May be Refused.*

The following general regulations will be used as a guide within the Division of Passport Control for determining whether passports may be refused to American citizens who otherwise would be entitled to them. It should be understood however that these instructions are not entirely comprehensive, and that instances will

arise in which passports should be refused although they are not covered by the following rules.

(1) *Disloyal Acts.*

* * * * *

(2) *Suspicion of Intention to Commit Crime or Otherwise to Bring Grave Discredit on This Country.*

* * * * *

(3) *Evaders of Justice.*

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(4) *Political Adventurers, et cetera.*

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(5) *Persons Suspected of Inducing Immigration.* See paragraph C, Code No. 3435.

(6) *Revolutionary Radicals.* See Code No. 5000.

These instructions are for the information and guidance of the employees of this Division only.

PHILIP ADAMS,
Chief, Division of Passport Control.

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4. Office Instructions of July 30, 1937:

ABSTRACT OF PASSPORT LAWS AND PRECEDENTS

(Passport Division Office Instructions)

Code No. 7.22
JULY 30, 1937

SECTION VII

Subject: *Classes of Persons Ordinarily Refused Passports Under the Discretionary Power of the Secretary of State.*

Under the discretionary power of the Secretary of State, a passport may be refused to any

person. The following categories are illustrative but not inclusive.

1. *Persons guilty of disloyal acts.* * * *

2. *Persons suspected of an intention to commit crime or otherwise to bring grave discredit on this country.* Such for example, as international swindlers and gamblers, persons engaged in the white slave traffic, opium smugglers, confidence men, international spies and other persons whose habitual business practices are such as to bring discredit upon America and things American.

3. *Evaders of Justice.* * * *

4. *Political adventurers, etc.* As those who wish to go abroad to take part in the political or military affairs of foreign countries in ways which would be contrary to the policy or inimical to the welfare of the United States.

5. *Policy of the Department.* The policy of the Department is as far as possible to base the refusal of passports on citizenship grounds only and not on other grounds. This code is not to be considered as listing with finality the classes of cases in which passports are to be refused on nonitizenship grounds. A case may arise not within one of the above classes and in which, if the circumstances so warrant, a passport may be refused. The above mentioned categories must be taken merely as guides, to put examiners on notice, and though a case may seem to fall within one of those categories a passport may ultimately be issued.

6. *Referring cases to the Chief of the Division.* All cases coming within the above categories must be referred to the Chief of the Division for a decision.

R. B. Shipley,
Chief, Passport Division.

5. Foreign Service Regulations of July 9, 1948:

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NOTE 32. *Classes of applications for service passports* [1] *to be referred to the Department of State for decision by issuing officers.* Officers of the Foreign Service designated by the Secretary of State to issue service passports shall refer the following classes of such applications to the Department of State for decision and shall not, except as hereinafter specifically provided, issue service passports to the applicants concerned until they have received advance authorization for such action from the Department:

* * * * *

(*c*) Applications submitted by persons of doubtful loyalty, criminals, political adventurers, and revolutionaries. If the officer has any reason to doubt the loyalty of an applicant for a service passport or if it is suspected that an applicant intends to commit crime or otherwise bring grave discredit on the United States as an evader of justice, a political adventurer desiring or intending to take part in the political or military affairs of a foreign government in ways which would be contrary to the policy or inimical to the welfare of the United States, a revolutionary radical, or a person engaged in subversive activities for a foreign government, the officer shall decline to issue a service passport to such applicant and shall forward the application to the Department with a statement of the facts in the case. In an emergency, and only after an investigation which proves his doubt or suspicion is unjustified, the officer may telegraph to the Department at its expense for authorization to issue a service passport.

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[1 "Service passports" are passports issued by Foreign Service Officers abroad, to whom these regulations are directed.]

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